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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MESSERSCHMITT BOLKOW BLOHM, GmbH.,
Petitioner,

v.

WALKER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether, on an application for discovery of evidence located abroad from a foreign national over whom the court has personal jurisdiction, a court in the United States may avoid the procedures of the Hague Evidence Convention * by ordering that the production of the foreign documents take place in the United States.

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* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and Germany on June 26, 1979).

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WALKER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Messerschmitt Bolkow Blohm, GmbH., ("Messerschmitt") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.[1]

OPINIONS BELOW

The judgment of the court of appeals (App. A) is reported at 757 F.2d 729; the opinion and order of the district court (App. B) are unreported; the ruling of the magistrate (App. C) is unreported.

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[1] The parties below included plaintiffs Virginia Walker, Anne Fee, J.J. Walker, Louise Walker, Dewey Fee, Hazel Fee, Robert Leo Brown, Mary Jane Brown, and Joan Brown; defendants Messerschmitt, MBB Helicopter Corp. ("MBB"), Lone Star Helicopters, North Central Texas Services (d/b/a Care Flight), Estate of Rick Lemar Fee, and Estate of Billy Wayne Walker; and nominal respondent United States District Judge the Honorable Barefoot Sanders. Messerschmitt's wholly-owned subsidiary is MBB Helicopter Corp.

JURISDICTION

The judgment of the court of appeals was entered April 18, 1985. The petition for writ of certiorari is therefore due on July 17, 1985. This Court has jurisdiction to issue the requested writ under 28 U.S.C. § 1254(1) (1983).

STATUTORY AND TREATY PROVISIONS INVOLVED

28 U.S.C. § 1254(1) (1983) provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

The provisions of Rule 34 of the Federal Rules of Civil Procedure are reproduced at App. D.

The provisions of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and Germany on June 26, 1979), are reproduced at App. E.

STATEMENT

The factual predicate for this petition is by now familiar to more than a few state and federal courts: A litigant seeks broad, U.S.-style discovery from a foreign litigant of documents located abroad, without using the procedures for obtaining such information established by the Hague Evidence Convention. In this case, discovery was sought in connection with an April 1982 helicopter accident near McKinney, Texas. On February 2, 1983, wrongful death beneficiaries of the three accident victims filed suit in Federal District Court for the Northern District of Texas against the foreign manufacturer of the helicopter, Messerschmitt, and its United

States distributor, MBB Helicopter Corporation.[2] The federal court's jurisdiction was invoked pursuant to 28 U.S.C. § 1332 (1983), as Messerschmitt is a German corporation wholly located in the Federal Republic of Germany and MBB is a corporation with its principal place of business and place of incorportion outside of Texas. Messerschmitt was served in accordance with the Hague Service Convention and MBB was served in accordance with the Texas long-arm statute.

On April 1, 1983, plaintiffs served directly upon Messerschmitt's counsel twenty "Requests for Production of Documents and Things." An additional Request for Production followed on April 14, 1983, seven Requests on July 22, 1983, two on July 29, 1983, and two on December 29, 1983.[3] Although many of these requests would require the production of evidence located in Germany, plaintiffs at no time submitted them in accordance with the procedures established by the Hague Convention. Under that Convention, one party can seek evidence located abroad from another party by causing the U.S. court to issue a letter of request to the foreign court. The Convention provides that such letters of request must "be executed expeditiously" Art. 9 (App. E at 23a) with "appropriate measures of compulsion" Art. 10 (App. E at 23a).

Because plaintiffs failed to proceed under the Hague Evidence Convention, Messerschmitt refused to comply with the requests for production of documents from Germany. Plaintiffs then moved to compel discovery, and Messerschmitt complained that plaintiffs sought to violate

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[2] Messerschmitt and MBB have brought third-party actions against the estates of two of the plaintiffs for contribution and indemnity. Two additional parties have entered the lawsuit as intervenors, asserting a property claim for the helicopter involved in the accident.

[3] Other Notices and Requests were served on Messerschmitt during this time but have since been found to be moot. MBB has been fully responsive to plaintiffs' discovery requests submitted under the Federal Rules of Civil Procedures.

German judicial sovereignty by failing to follow Convention procedures. The magistrate was unmoved by Messerschmitt's argument and granted plaintiffs' Motion to Compel (App. C). On September 12, 1984, the district court affirmed that order, while acknowledging the "conflict in the authorities" (App. B at 11a). After the district court refused to reconsider its ruling, to stay its decision, or to grant leave for an interlocutory appeal, Messerschmitt on October 5, 1984, petitioned the United States Court of Appeals for the Fifth Circuit for an emergency stay and expedited ruling on its petition for a writ of mandamus requiring the district court to vacate its orders. On October 10, 1984, the court of appeals stayed the district court's orders pending its decision on the petition for writ of mandamus.

In support of its mandamus petition, Messerschmitt argued that the procedures established by the Hague Convention for taking evidence abroad are exclusive and mandatory and, in the alternative, that important principles of judicial restraint and international comity require use of Convention procedures as the first step in attempting to secure evidence from abroad. Petitioner further noted that a United States court order directing documents to be produced from within Germany without the permission or assistance of the local courts would constitute a serious violation of Germany's judicial sovereignty.[4]

On April 18, 1985, the court of appeals denied Messerschmitt's mandamus petition. The court acknowledged that *In re Anschuetz & Co., GmbH.*, 754 F.2d 602 (5th Cir. 1985) (recently decided by a different

[4] In its petition for writ of mandamus, Messerschmitt also sought review of the district court's order refusing to quash notices of depositions for certain Messerschmitt officials. Although the court of appeals in its decision reached this issue, since the court of appeals ruling depositions of trial experts, some of whom were previously noticed, have been taken, making the issue moot for present purposes. Messerschmitt therefore does not seek review of this part of the court of appeals judgment.

panel of the same court), the German government had said that United States courts' ordering production of documents located in Germany was an invasion of German sovereignty. The court further observed that "[o]ur pretrial procedures for broad disclosure of documents and depositions of witnesses are alien to a civilian system." 757 F.2d at 732 (App. A at 4a). Nevertheless, the court, relying throughout upon its decision in *Anschuetz*, held that the Convention by its terms was inapplicable to the discovery being sought because the documents were to be produced in the United States. *Id.* at 731 (App. A at 3a). The court went on to consider whether as a matter of comity the discovery at issue here should have been made through the procedures of the Hague Evidence Convention even though use of such procedures was not required as a matter of law. The court concluded that comity does not require resort to Hague Convention procedures where the ordered production of documents is to take place in the United States because such production "does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany." *Id.* at 732 (App. A at 5a).

REASONS FOR GRANTING THE WRIT [5]

This case presents a question of increasing importance in the administration of justice within the federal and state court systems: when and to what extent litigants must use the procedures of the Hague Evidence Convention to obtain evidence from the territory of nations that, with the United States, have signed and ratified the Hague Evidence Convention. Because they have not yet received guidance from this Court on the question, the lower federal courts and the state courts are issuing a

[5] The question presented by this case and the reasons for granting the writ are substantially the same as the question and reasons presented by the petition for writ of certiorari in *Anschuetz & Co., GmbH. v. Mississippi River Bridge Authority, et al.*, No. 84-—— (petition for writ of certiorari filed July 17, 1985).

growing number of confusing and contradictory decisions. As a result, the effects of the Convention for individual litigants turn upon the particular forum in which they happen to appear. Moreover, the decision of the court of appeals in this case will intensify international conflicts over evidence-gathering in United States proceedings and is unnecessary to protect the right of United States litigants to have a fair hearing on their claims. This Court should grant certiorari in order to put an end to the confusion and to establish the Convention as an effective means for reconciling the United States system of litigation with the legal systems of our trading partners and allies.

I. What Role the Hague Evidence Convention Has in United States Litigation Is an Important Question.

The appropriate role of the Hague Evidence Convention in U.S. litigation is a question of undeniable importance to the administration of justice in federal and state courts. The Hague Evidence Convention creates procedures by which United States litigants in civil cases can obtain evidence from abroad from states that are parties to the Convention. Some of the most important trading partners of the United States have ratified the Convention, including the United Kingdom, the Federal Republic of Germany, France, Italy, Sweden, the Netherlands, Israel, Denmark, and Norway. The growth of international trade has caused a dramatic increase in the number of cases in United States federal and state courts involving parties from these countries.

The Hague Evidence Convention played a minor role in United States litigation with foreign nationals until a growing number of nations had ratified the Convention. Indeed, the first reported U.S. cases in which litigants urged that the Hague procedures be used for obtaining foreign evidence came from the California appeals court in 1981 and 1982,[6] a decade after U.S. ratification in

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[6] *Pierburg GmbH. & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982); *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981).

1972. In the last three years, however, the number of reported cases in which courts have addressed the need to resort to the procedures of the Hague Evidence Convention has been increasing rapidly, with at least nine cases in 1983,[7] at least twelve cases in 1984,[8] and at least six cases decided already in 1985.[9] These cases are, of course, only the tip of the much larger iceberg of un-

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[7] *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D., Pa. 1983); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983); *Wilson v. Stillman & Hoag, Inc.*, 476 N.Y.S.2d 764 (1983); *Schroeder v. Lufthansa German Airlines*, No. 83 C 1928 (N.D. Ill. Sept. 15, 1983) (memorandum opinion); *Thompson v. Continental Machine & Tool Co.*, No. EC 81-181-LS-P (N.D. Miss. Sept. 21, 1983); *Miller v. Hawes Firearm Co.*, No. F82-036 (D.Alaska Oct. 13, 1983); *Cannon v. Arburg Maschinenfabrik*, No. 80 L 2275 (Ill. Cir. Ct. July 21, 1983); *Van Dongen v. Arburg Maschinenfabrik*, No. L-71021-81 (N.J. Super. Ct. July 1, 1983); *Angulo v. Kedzep Ltd.*, 29 Bankr. 417 (S.D. Tex. 1983).

[8] *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984); *McLaughlin v. Fellows Gear Shaper Co.*, 102 F.R.D. 956 (E.D. Pa. 1984); *International Society for Krishna Consciousness, Inc. v. Lee*, 425 F. Supp. 681 (S.D.N.Y. 1984); *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984); *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D. Vt. 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op. (S.D.N.Y. May 30, 1984); *General Electric Co. v. North Star Int'l, Inc.*, No. 83 C 0838 (N.D. Ill. Feb. 21, 1984) (memorandum opinion and order); *Worthington v. Polymer Machinery Corp.*, No. 83-2131 (E.D. Pa. Jan. 12, 1984); *Th. Goldschmidt A.G. v. Smith*, 676 S.W.2d 443 (Tex. Ct. App. 1984); *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686 (1984); *Compagnie Francaise d'Assurance v. Phillips Petroleum Co.*, No. 81 Civ. 4463 (S.D.N.Y. Dec. 10, 1984).

[9] *In re Anschuetz & Co., GmbH.*, 754 F.2d 602 (5th Cir. 1985); *In re Messerschmitt Bolkow Blohm, GmbH.*, 757 F.2d 729 (5th Cir. 1985); *Laker Airways Ltd. v. Pan American World Airways*, No. M. 8-85, slip op. (S.D.N.Y. Mar. 22, 1985); *Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher*, No. 16562 (W. Va. Mar. 22, 1985); *Performance Indus., Inc. v. Honda Motor Co., Ltd.*, No. 83-4863, slip op. (E.D. Pa. Mar. 1, 1985); *Griffis v. Aerospatiale Helicopter Corp.*, No. A83-602 (D.Alaska June 4, 1985) (order).

reported decisions usually rendered in discovery disputes. With respect to German companies alone, petitioner estimates that there are currently about 1,500 cases pending in the U.S. courts in which the discovery of foreign evidence is an issue.[10]

As a reflection of the growing importance of the dispute among the lower courts over the role of the Hague Convention in U.S. litigation, this Court was twice asked recently to address this question. In the first case, *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 1260 (*appeal dismissed*), *reh. denied*, 104 S. Ct. 1932 (1984), a Michigan trial court ordered the German defendant to make its employees available for deposition by U.S. counsel in Germany before U.S. consular officials. On appeal from the Supreme Court of Michigan, the appellee defended this order as lawful under an exchange of diplomatic notes verbale between the United States and Germany covering consular depositions and under the provisions of the Hague Evidence Convention. The Court asked for the views of the Solicitor General on these questions.[11]

In his brief of December 19, 1983, the Solicitor General set forth the position of the United States government that the Hague Evidence Convention "deals comprehensively with the methods available to United States Courts and litigants to obtain proceedings abroad for

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[10] A substantial scholarly literature now exists on the Convention and its role in U.S. litigation. Particularly insightful is Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733 (1983).

[11] *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 62 (1983). By the time the notice of appeal was filed, this Court had already acted twice to stay the threatened depositions, first by order of the Chief Justice before the Michigan Supreme Court's decision (*Volkswagenwerk A.G. v. Falzon*, No. A-191, O.T. 1981 (Aug. 23, 1982), *motion to vacate denied*, Sept. 2, 1982), and second by Justice O'Connor after the Michigan Supreme Court declined to hear the case (*Volkswagenwerk A.G. v. Falzon*, 103 S. Ct. 1810 (1983)).

taking evidence," [12] that the "parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted," [13] and therefore that the noticed depositions were contrary to the Conventon.[14] The Solicitor General further rejected the assertion that the state trial court could order the defendant to submit to the depositions despite the provisions of the Convention simply because it had personal jurisdiction over the defendant.[15] Nevertheless, the Solicitor General urged the Court not to review *Falzon* on the merits because the U.S. government had ordered its consular officials not to cooperate with plaintiff's counsel, thereby making the depositions impossible as a practical matter.[16] This fact, as well as the relative infrequency of U.S. courts' ordering depositions to be taken abroad, made *Falzon* an unsuitable vehicle for this Court to rule upon the role of the Hague Evidence Convention in U.S. litigation, and the Court accordingly dismissed the appeal.[17] Neither of these considerations applies to the present case, where no intervention by the U.S. government will make the issue moot and what is at issue is the much more common practice of compelling foreign nationals to bring their documents to the United States.

The second recent case in which questions concerning the role of the Hague Evidence Convention were brought to this Court was *Club Mediterranee, A.S. v. Dorin*, 105 S. Ct. 286 (1984) (*appeal dismissed and cert. denied*).

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[12] Brief for the United States as Amicus Curiae at 5, *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 1260 (*appeal dismissed*), *reh. denied*, 104 S. Ct. 1932 (1984).

[13] *Id.* at 6.

[14] *Id.* at 7.

[15] *Id.* at 7, n.3.

[16] *Id.* at 11-12.

[17] *Volkswagenwerk A.G. v. Falzon*, 104 S. Ct. 1260 (*appeal dismissed*), *reh. denied*, 104 S. Ct. 1932 (1984).

In that case a New York state trial court had ordered a French defendant to answer interrogatories despite the defendant's claim that at least some of the information required by the interrogatories would have to come from France, which by law prohibited disclosure of information to courts outside France except where the information was sought through the mechanisms of the Hague Evidence Convention. Once again the Court called for the views of the Solicitor General.[18] The Solicitor General stated that the case presented "important questions concerning the proper procedures to be followed by United States courts in ordering discovery where the party from whom discovery is sought claims that the information necessary to respond to the discovery request is located in a foreign state that is a party to the Hague Evidence Convention." [19] Nevertheless, the Solicitor General urged the Court not to grant certiorari because the courts below had not made express findings sufficient for adequate review, particularly as to whether the French government had any objection to the particular discovery sought in that case.[20] The Court followed the suggestion of the Solicitor General, dismissing the appeal and denying the petition in the alternative for certiorari.[21] Once again, however, the Court's failure to grant plenary review in *Club Med* in no way reflects on the importance of the question presented or on the appropriateness of the present case as the vehicle for addressing this question. Here there is a fully developed record, including a clear expression of the German government's objections to the discovery ordered.

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[18] *Club Mediterranee, S.A. v. Dorin*, 104 S. Ct. 1268 (1984).

[19] Brief for the United States as Amicus Curiae at 3, *Club Mediterranee, S.A. v. Dorin*, 105 S. Ct. 286 (1984) (*appeal dismissed and cert. denied*).

[20] *Id.* at 14.

[21] 105 S. Ct. 286 (1984).

II. Lower Federal and State Courts Are Sharply Divided Over the Role of the Hague Evidence Convention in United States Litigation.

The lower federal and state courts are far from reaching a consensus view—or even a majority rule—on whether or in what circumstances the Hague Evidence Convention procedures should be used by United States litigants seeking evidence from abroad. Several courts have concluded, as the West Virginia Supreme Court did in a carefully-reasoned decision handed down less than a month before the ruling of the court of appeals in the instant case, that the procedures of the Hague Evidence Convention must be used in the first instance when a United States litigant seeks to compel a party who is a national of a signatory state to produce documents from abroad.[22] Other courts have concluded, as the court of appeals did here, that the Hague Evidence Convention simply does not apply to discovery of evidence from abroad, so long as the United States court orders that the production of the evidence take place in this country—even though the party is compelled to gather the evidence abroad and transport it to this country.[23] At

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[22] *Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher*, No. 16562 (W. Va. Mar. 22, 1985). *Accord, Th. Goldschmidt A.G. v. Smith*, 676 S.W.2d 443 (Tex. Ct. App. 1984); *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686 (1984); *General Electric Co. v. North Star Int'l, Inc.*, No. 83 C 0838 (N.D. Ill. Feb. 21, 1984) (memorandum opinion and order); *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983); *Pierburg GmbH. & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982).

[23] *International Society for Krishna Consciousness, Inc. v. Lee*, 425 F. Supp. 681 (S.D.N.Y. 1984); *Cooper Indus. v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y 1984); *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op.

the extremes, some courts have ruled that the Hague Evidence Convention is the exclusive means of obtaining evidence from abroad; [24] other courts have ruled that they need not follow Convention procedures even in ordering inspections or interviews on foreign territory.[25]

While there is widespread conflict and disagreement in the lower federal and state courts over the Hague Evidence Convention's impact on discovery of evidence located abroad, the very nature of the issue presented makes its review in plenary decisions of courts of appeals a relatively rare phenomenon: Discovery disputes do not often survive trials on the merits and interlocutory review by writ of mandamus is by its very nature extraordinary and difficult to obtain. At the same time, the large number of conflicting decisions demonstrates both the importance of the matter and the need for definitive appellate guidance. With the Court of Appeals for the Fifth Circuit now squarely in conflict with the Supreme Court of West Virginia [26] and other state courts, only a ruling by this Court can resolve the divergent positions.

(S.D.N.Y. May 30, 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D.Vt. 1984); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983).

[24] *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 (Conn. Super. Ct. July 22, 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention).

[25] *See Volkswagenwerk A.G. v. Falzon*, Nos. 77-722-371 NP, 78-803-043 NP (Mich. Cir. Ct. Oct. 7, 1980) (order permitting plaintiffs to attempt to take depositions of German citizens in Germany).

[26] *Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher*, No. 16562 (W. Va. Mar. 22, 1985).

III. The Court of Appeals in the Present Case Seriously Misapprehended the Role of the Hague Evidence Convention in United States Litigation.

In addition to the importance of the question presented, and the sharp conflicts over the question among the lower courts, the Fifth Circuit's decision stands in marked contrast to the proper comity analysis and treaty construction performed by some other federal and state courts. In essence, the Fifth Circuit has ruled that the Hague Evidence Convention is "optional" and may be disregarded whenever the United States court seeks to compel production of evidence from abroad, provided that the evidence is within the control of a party subject to a court's jurisdiction and provided that the actual physical production of the evidence takes place within the territory of the United States. Such an interpretation contravenes the apparent intent of the parties to the Convention and robs the Convention of its potential role in ameliorating the international conflicts created by United States courts' exercise of jurisdiction to order discovery from abroad.[27]

A. *The Hague Evidence Convention Cannot Properly Be Interpreted as an Optional Means of Obtaining Evidence from the Territory of Signatory States.*

Several courts in the United States, confronted with requests for discovery that attempt to avoid the procedures of the Hague Convention, have required the parties seeking the evidence from abroad to use only Hague Convention procedures.[28] As the court in *Cuisinarts* ob-

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[27] "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States. Some 15 states [as of 1984] have adopted legislation expressly designed to counter U.S. efforts to secure production of documents situated outside the United States . . . ." Restatement of U.S. Foreign Relations Law (Revised), Tent. Draft No. 6 (Vol. 1) (Apr. 12, 1985), p. 333.

[28] *Worthington v. Polymer Machinery Corp.*, No. 83-2131 (E.D. Pa. Jan. 12, 1984); *Rockwell Int'l Corp. v. Construzioni Aeronau-*

served, "[t]he ratification of the Convention brings to a climax years of effort in the United States by those interested in modernizing and improving international and judicial assistance. Neither in the language of the Convention itself nor in any official communique regarding the effect of the Convention is there any indication that the U.S. Delegation[,] or any other party to the Convention, viewed the document as optional in nature." [29] Some of the principal signatories to the Convention have indicated their understanding that, absent bilateral or other multilateral understandings, Convention procedures were to be the exclusive means of obtaining evidence from abroad for use in civil proceedings.[30] Indeed, it is difficult to see why countries such as Germany agreed to compel their citizens to provide evidence to United States courts if it was not in exchange for some limitation on

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tiche Giovanni Augusta, S.P.A., No. 81-3984 (E.D. Pa. May 17, 1983) (order *reversing* order of Mar. 21, 1983); *Cannon v. Arburg Maschinenfabrik*, No. 80 L 2275 (Ill. Cir. Ct. July 21, 1983); *Kantor v. Cycles Peugeot, S.A.*, No. 81-0423 (D.R.I. Apr. 14, 1982) (memorandum and order); *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 (Conn. Super. Ct. July 22, 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention); *Langhans v. Johns-Manville Sales Corp.*, No. 535530-7 (Cal. Super. Ct. Aug. 25, 1981 (minute order); *Croxton v. Johns-Manville Sales Corp.*, No. L-6001-79 (N.J. Super. Ct. May 20, 1980).

[29] *Cusinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 at 7 (Conn. Super. Ct. July 22, 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention).

[30] For example, the government of the Federal Republic of Germany has repeatedly expressed its view that the Convention is exclusive. *See* Brief of the Federal Republic of Germany as Amicus Curiae at 5-9, *In re Anschuetz & Co., GmbH.*, 754 F.2d 602 (5th Cir. 1985). The French Senate and National Assembly, angered by American litigants' disdain for Convention procedures, have made it a criminal offense to request or transmit certain evidence for use in a foreign proceeding in a matter unauthorized by the Hague Convention or other international treaty. Herzog, *The 1980 French Law on Documents and Information*, 75 Am. J. Int'l L. 382 (1981).

the methods or scope of United States discovery from abroad.[31]

The reluctance of most U.S. courts to accept the exclusivity of Convention discovery procedures stems in significant part from a misunderstanding of the consequences of such acceptance. Refusing to treat Convention discovery procedures as an easily-avoided option would not, as the Fifth Circuit claimed, give to foreign litigants "an unfair evidentiary advantage over their American opponents." 757 F.2d at 731 (App. A at 3a). The Convention in no way prevents courts from protecting the integrity of their factfinding procedures by (1) excluding evidence when the opposing party cannot test its probative value through examination of underlying and related evidence located abroad or (2) drawing adverse inferences from a party's failure to produce voluntarily evidence located abroad. Indeed, U.S. courts may impose a variety of non-punitive sanctions, including judgment of default on the record, upon a foreign litigant unwilling to comply with discovery requests. The Convention deals not at all with what a U.S. court does to decide a case based on the evidence provided or not provided to it.[32] Instead, in our submission, it restricts only the

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[31] *See* Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651 (1969) ("In 1964 [four years before the Hague Evidence Convention was negotiated] Rule 28(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1781 and 1782 were amended to offer to foreign countries and litigants, without a requirement of reciprocity, wide judicial assistance on a unilateral basis for the obtaining of evidence in the United States"); Oxman, *supra* n. 10, at 760 (". . . one may argue that if the convention does not restrict unilateral extraterritorial discovery methods, then the civil law countries received no meaningful quid pro quo for their concession to the United States under the convention").

[32] For example, under the heading "Matters Excluded From the Convention," the following appears in the Explanatory Report of the Rapporteur: "A proposal to regulate the effect of the refusal of a witness to appear and testify before a consul or commissioner was not approved. This is a matter for the domestic law of the forum where the action is to be tried. The judge in charge of the trial

Court's ability to compel, upon pain of monetary fines or other punishment for contempt, the production of evidence located abroad in the territory of a Convention state.[33]

B. *A Proper Comity Analysis Compels Resort to the Procedures of the Hague Convention in the First Instance by United States Courts.*

If, upon examination, this Court decides that the Hague Evidence Convention does not provide the exclusive procedures in civil cases for discovery of evidence located abroad in the territory of contracting states, then U.S. courts should at least be required to exhaust Convention procedures before resorting to other means of discovery potentially offensive to foreign governments. The Fifth Circuit's determination that the Convention need not be employed, even in the first instance, so long as the documents are ordered to be produced in the United States is the result of a faulty analysis of what the principle of comity requires.

Under the principle of comity, U.S. courts seek to accommodate important sovereign interests of other nations, as expressed in those nations' legislative, executive, or judicial acts, where such accommodation can be achieved consistent with the rights of U.S. citizens and others under the protection of U.S. laws.[34] In the discovery area, courts have developed from this general principle of comity the particular rules that foreign discovery ordinarily should be sought by the least intrusive means available, that discovery will be ordered from

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may decide what inference may be drawn from the failure of a party, or of a witness not a party, to give evidence." Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (1972) at 41.

[33] *See Societe Internationale v. Rogers*, 357 U.S. 197, 209-10 (1958) (discussing distinction between a default judgment entered as "mere punishment" and one entered as the result of a "permissible presumption" arising from failure to produce evidence); Moore's Federal Practice ¶ 37.03[2] at 59-62 (1984).

[34] *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

abroad in defiance of the will of foreign sovereigns only to the extent it is strictly necessary, and that generally U.S. sources of evidence should be exhausted before foreign sources are tapped. By a parity of reasoning, comity requires that the procedures of the Hague Evidence Convention for obtaining evidence from foreign sources be exhausted before alternatives are considered, both because the alternatives are viewed by other nations as invading their sovereign interests and because requiring such exhaustion will not seriously impair the rights of U.S. litigants.

In its comity analysis in the present case, the court of appeals entirely misapprehended the German interests at stake, considering only the German interest "in maintaining control over its judicial system." 757 F.2d at 732 (App. A at 4a). Although the court admitted that U.S. style discovery ordered against parties in Germany "may indeed inconvenience the German civilian judicial system," *id.*, it concluded that such "inconvenience" was minimal because an order that German citizens bring their documents to the United States "does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany." *Id.*

But the sovereign German interest in U.S. discovery of evidence located in Germany goes far beyond "inconvenience" to the German judicial system. In a civil law state such as Germany, the evidence-gathering function is placed in the hands of the courts in order to ensure that discovery will be conducted consistently with the state's jurisprudence governing the occasions and conditions upon which coercive governmental power will compel disclosure of normally private information. This jurisprudence balances, for the general welfare of the foreign state, the conflicting interests implicated by compelled disclosure of information for use in legal proceedings. That balance is necessarily upset, and the state's jurisprudence is necessarily revised, to the extent that information held in the foreign sovereign's territory by na-

tionals of that sovereign is subject to disclosure by orders framed according to the dictates of an alien jurisprudence—as, for example, where Germany or other civil law countries would recognize a privilege (*e.g.*, for a business secret) or mandate a procedure (*e.g.*, examination of a deponent by a judge) not required by the United States or other common law countries. Hague Convention procedures are thus a vital mechanism for providing the foreign state with the opportunity to participate, through its courts, in the discovery process and to help frame an accommodation between the foreign state's legal principles and the U.S. discovery request.

Just as the court of appeals misapprehended the German interest at stake, it likewise misunderstood the United States interest against which the German interest was to be weighed. According to the court of appeals, Hague Convention procedures must be circumvented in order to protect "the American interest in obtaining full pretrial discovery of information relevant to pending litigation in the United States." *Id.* But, of course, that is not what is at stake for the United States at all: the question presented by a foreign national's insistence on exhaustion of Hague Convention procedures is only whether those procedures will be used in the first instance, not whether the requested discovery will ultimately be compelled by the U.S. court. Properly viewed, the U.S. interest in avoiding entirely any use of the Hague Convention procedures, and thus denying the foreign court any opportunity to participate in and inform the discovery process, is quite weak.

To be sure, in many cases the letter of request procedure of the Hague Evidence Convention may be somewhat more time-consuming or cumbersome than a direct discovery order to the foreign party, but that is often true of judicial processes, such as notice and the opportunity to be heard, that afford necessary protections to affected interests. Nor are U.S. interests *ipso facto* invaded if the letter of request is not fully complied with

by the foreign court.[35] In those cases where foreign law or practice blocks some or even all of the requested discovery, the foreign court will advise the United States court, pursuant to Article 13 of the Convention, "immediately" of the "reasons" why the request may not have been executed "in whole or in part." The United States court, having the benefit of these reasons, can then decide what further action is necessary and appropriate.

[35] While Article 23 of the Convention provides that "[a] Contracting State may . . . declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries," U.S. courts should not automatically assume that countries that have exercised their rights under Article 23 will fail to cooperate in providing requested evidence contained in documents. To the contrary, it appears that the reservation was intended only to prevent discovery of a "fishing nature." *See* Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters *reprinted in* 17 *Int'l Legal Materials*, 1417, 1421 (1978). Moreover, the Convention narrowly circumscribes those situations in which the execution of a Letter of Request may be refused. Art. 12. It also expressly contemplates the good faith attempt of foreign courts to implement any legitimate discovery request. Art. 9.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted to afford the Court the opportunity to set forth definitively the role of the Hague Evidence Convention in U.S. litigation before federal and state courts alike.

Respectfully submitted,

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July 17, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-1877

IN RE MESSERSCHMITT BOLKOW BLOHM, GmbH.,
Petitioner.

April 18, 1985

On Petition for Writ of Mandamus to the
United States District Court for the
Northern District of Texas

Strasburger & Price, Royal H. Brin, Jr., Charles M. Hosch, Dallas, Tex., for appellant.

Michael Slack, John Howie, Dallas, Tex., Munson, Munson, Hyndos, Gordon & Pierce, J. Don Gordon, Peter K. Munson, Sherman, Tex., Johnson, Bromberg & Leeds, Charles L. Perry, Dallas, Tex., for appellee.

Before RUBIN, RANDALL and TATE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Three occupants of a helicopter died when the helicopter crashed in April 1982 near McKinney, Texas. Their wrongful-death and survival-statute beneficiaries sued the manufacturer of the helicopter, Messerschmitt Bolkow Blohm, GmbH. (Messerschmitt), a foreign corporation, and the United States distributor of Messerschmitt's helicopters, MBB Helicopter Corporation (MBB), a Delaware and Pennsylvania corporation which is a wholly-owned subsidiary of Messerschmitt, in federal district court in Texas. The jurisdiction of the

district court over both defendants is conceded. The district court ordered Messerschmitt: (1) to respond to requests for the production of documents by producing in the United States documents in its possession and physically located in Germany; and (2) to produce for depositions in the United States at a reasonable time in advance of trial the persons Messerschmitt may call as expert witnesses at the time of trial. The expert witnesses are German employees of Messerschmitt residing in Germany. The court has issued no subpoena directing the witnesses to appear. Messerschmitt seeks mandamus directing the district court to revoke the discovery orders and requiring instead that discovery be conducted in accordance with the procedures set forth in the Multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (the Hague Convention).[1] Guided by this court's opinion in *In Re Anschuetz and Company v. Compania Gijonesa de Navegacion*,[2] decided after the district court entered its orders, we hold that the Convention does not apply to the discovery sought here because the proceedings are in a United States court, involve only parties subject to that court's jurisdiction, and ultimately concern only matters that are to occur in the court's jurisdiction, not abroad. We discuss the two discovery problems here involved separately, applying the principles set forth in that decision.

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[1] Done March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (Hague Convention) entered into force for the United States October 7, 1972). The Convention was initially adopted to provide a uniform system of discovery in foreign jurisdictions. It was based on the framework established by the Multilateral Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, done November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638. West Germany participated effective June 1979.

The following states are parties to the convention: Barbados, Czechoslovakia, Denmark, Finland, France, Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom, and the United States.

[2] 754 F.2d 602 (5th Cir. 1985).

I. Document Discovery

In *Anschuetz*,[3] we held that the Federal Rules of Civil Procedure, not the Hague Convention, normally govern the discovery of documents from foreign parties subject to the jurisdiction of a United States court, even though those documents are physically located in the territory of a foreign signatory of the Hague Convention. We stated that such discovery should be considered as taking place in the United States and, therefore, is not governed by the Hague Convention.[4] We reasoned that the Hague Convention was " 'not intended to protect foreign parties, over whom an American court properly has jurisdiction, from the normal range of pretrial discovery available under the Federal Rules of Civil Procedure.' "[5] Were the Convention viewed as the exclusive procedure for foreign discovery of foreign parties, these parties would be given an unfair evidentiary advantage over their American opponents. The foreign party would have full discovery of his opponent under the Federal Rules of Civil Procedure, while the American litigant would be forced to rely upon Hague Convention procedures. Should the foreign government prove unwilling to carry out discovery requests under the Convention, the American litigant would be unable to prepare its case against the fully-prepared foreign party.[6]

We stated, however, that United States courts should not intrude unnecessarily into matters of concern to other nations. A district court should consider whether, as a matter of international comity, the parties should be required to proceed under the Hague Convention before

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[3] *Supra* note 2.

[4] *In Re Anschuetz, supra* note 2 at 611, 615.

[5] In *Re Anschuetz, supra* note 2 at 611, *quoting Graco v. Kremlin, Inc.*, 101 F.R.D. 503, 521 (N.D. Ill. 1984).

[6] *In re Anschuetz, supra* note 2 at 606.

discovery is compelled under the Federal Rules of Civil Procedure.[7]

In response to an invitation by the *Anschuetz* panel, the Federal Republic of Germany filed a brief stating that "[c]*ompliance in Germany* with the order of the U.S. District Court *mandating . . . the production of documents located in . . . Germany*, would be a violation of German sovereignty unless the order is transmitted and executed by the method of Letter of Request under the Evidence Convention."[8] The United States Department of Justice also filed a brief urging the court to make a careful comity analysis before departing from Hague Convention procedures. While the *Anschuetz* panel left this comity analysis to the district court on remand, we choose to expedite this litigation by weighing the competing national interests and deciding the legal issue now.[9]

"Comity"[10] requires us to weigh Germany's interest in maintaining control over its judicial system against the Amercan interest in obtaining full pretrial discovery of information relevant to pending litigation in the United States. American discovery procedures may indeed inconvenience the German civilian judicial system. Our pretrial procedures for broad disclosure of documents and depositions of witnesses are alien to a civilian

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[7] *In re Anschuetz, supra* note 2 at 614.

[8] (Emphasis added.)

[9] This suit was filed more than two years ago and remains at the pre-trial discovery stage.

[10] *See Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 143, 40 L.Ed. 95, 108 (1895); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C.Cir.1984); *Volkswagenwerk v. Superior Court*, 123 Cal.App.3d 840, 857, 176 Cal.Rptr. 874, 884 (Cal.App. 1981).

system, in which discovery is controlled by judicial officers and restricted in scope.[11]

Discovery, under the Federal Rules, of documents located in Germany need not directly involve German judicial officers; but Germany is legitimately concerned, as evidenced by its brief to the *Anschuetz* panel, lest documents within its borders and owned by its nationals be disclosed in foreign procedures.[12]

The American litigants' interest in promptly obtaining the documents and deposition testimony necessary to prepare for complex litigation in an American court must also be considered. The district court's order does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany. It requires only that a party admittedly subject to the personal jurisdiction of a United States court produce documents in the United States. The order for production of documents, therefore, appears to balance appropriately the considerations involved.

II. Expert Witnesses

In *Anschuetz*, we held that, when a foreign corporation is subject to the personal jurisdiction of a United States court, the district court may order the taking of its employees' depositions in the United States even though those employees reside within a foreign signatory

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[11] *E.g.*, *Shemanski*, Obtaining Evidence in the Federal Republic of Germany—the Impact of the Hague Evidence Convention on German-American Judicial Cooperation, 17 Int'l Law 465 (1983); Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U.Pa.L.Rev. 1461, 1464 (1984).

[12] *E.g.*, Comment, *supra* note 11, 132 U.Pa.L.Rev. at 1464-65 ("[I]n civil law countries an attempt by a private party to gather evidence for use in a proceeding abroad may be an illegal usurpation of a 'public-judicial' function, and considered an affront to that nation's 'judicial sovereignty.' ").

of the Hague Convention.[13] Because the depositions will in fact be taken in the United States, they are not governed by the Hague Convention.

The American plaintiffs seek only to depose in the United States in advance of trial those employees whom the foreign corporation, Messerschmitt, intends to call as expert witnesses at the trial. Were the Hague Convention the plaintiffs' exclusive remedy, and were they unable to obtain the employees' depositions through Convention procedures, the foreign corporation would be able to present expert witnesses without affording the plaintiffs the opportunity to depose those witnesses before trial. The Convention was not intended to give foreign litigants this kind of advantage in American courts.

The *Anschuetz* panel stated that, in connection with depositions, as with document discovery, a district court should consider whether comity requires that the depositons first be sought under Hague Convention procedures.[14] In its *Anschuetz* brief, Germany stated, "Compliance in Germany with [an] order of the U.S. District Court *mandating the taking of oral depositions in Kiel, Germany* . . . would be a violation of German sovereignty unless the order is transmitted and executed . . . under the [Hague] Evidence Convention."[15] The district court order that German nationals be produced for deposition in the United States might concern Germany, but it does not involve alien procedures on German soil, is directed to the party-defendant and not the foreign witnesses, and

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[13] *In re Anschuetz, supra* note 2 at 615.

[14] *In re Anschuetz, supra* note 2 at 614. Taking the employees' depositions in Germany under the Hague Convention would require either a voluntary appearance before a United States diplomatic officer or consular agent (Hague Convention, *supra* note 1, Arts. 15, 16), the assistance of Germany to obtain compulsory attendance (Convention Art. 18), or the services of a commissioner appointed with the consent of Germany (Convention Art. 17).

[15] (Emphasis added.)

is enforceable only by procedures and sanctions directed to a party to the litigation in the forum court. The order appears to be a complement to the measures for trial preparation expressly sanctioned by Federal Rule of Civil Procedure 26(b)(4), the applicable text of which is set forth in the footnote.[16] The order therefore does not implicate the comity considerations addressed in *Anschuetz*.[17]

Were the witnesses to be deposed in Germany, other considerations would be applicable. The Hague Convention provides convenient procedures for taking witnesses' depositions in Germany without unnecessarily offending German sovereignty. But what would be appropriate for depositions on foreign soil need not be determined here. If within a reasonable period of time prior to the trial date, to be fixed by the district court, Messerschmitt does not arrange for the appearance of its employee-expert witnesses for depositions in the United States, the district court may invoke any of the sanctions available by virtue of the Federal Rules to compel compliance with its orders, including the exclusion of the employees' testimony at trial.

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[16] (4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

[17] *See In re Anschutez, supra* note 2 at 615.

The district court may require that the production both of documents and witnesses for deposition be completed sufficiently in advance of trial to permit adequate pretrial preparation.

The plaintiffs have urged us to decide this case on the basis that Messerschmitt's creation of a subsidiary to operate under the laws of the United States waives its rights under the Hague Convention. They do not contend that MBB is either a sham corporation or the artificial alter-ego of Messerschmitt. Counsel for plaintiffs cites no authority and gives no reason for disregarding the independent corporate existence of the subsidiary or treating its creation as a waiver of the foreign corporation's treaty rights. *Cooper Industries, Inc. v. British Aerospace* [18] is inapposite, for its rationale is that a domestic corporation "cannot be allowed to shield crucial documents from discovery . . . merely by storing them with its affiliate abroad. Nor can it shield documents by destroying its own copies and relying on customary access to copies maintained by its affiliate abroad." [19] There is not even a suggestion here, let alone evidence, that either MBB or Messerschmitt has engaged in such tactics. The *Cooper* court went on to hold that the documents were within the domestic defendant's custody because that defendant sold and serviced planes to which the documents, mostly service manuals and blueprints, related. The record lacks evidence from which we might conclude that MBB has custody or control of the documents. To the extent the Hague Convention might be applicable to future discovery proceedings under the principles of *Anschuetz*, it was not waived by creation of the subsidiary.

Finding nothing in the district court orders that transgresses *Anschuetz*, we DENY the petition for mandamus.

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[18] 102 F.R.D. 918 (S.D.N.Y.1984).

[19] *Id.* at 920.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-83-0199-H

Consolidated with
Civil Action No. 3-83-1765-H

VIRGINIA WALKER, ET AL.,
Plaintiffs

LONE STAR HELICOPTERS AND
NORTH CENTRAL TEXAS SERVICES,
d/b/a CARE FLIGHT,
Intervenors/Counter Defendants

v.

MESSERSCHMITT BOLKOW BLOHM, GmbH.,
Defendants/Third-Party Plaintiffs/
Counter Defendants

v.

THE ESTATE OF RICK LEMAR FEE AND THE
ESTATE OF BILLY WAYNE WALKER,
Third-Party Defendants

Filed Sept. 12, 1984

ORDER

This case is before the Court on the Application for Review of Magistrate's Ruling, filed by Defendant Messerschmitt Bolkow Blohm, GmbH. ("Messerschmitt") on August 6, 1984; Messerschmitt's supplemental correspondence, filed August 16 and August 30, 1984; Plaintiff's Reply to Messerschmitt's Application for Review of Magistrate's Ruling, filed by Plaintiffs Virginia Walker, et al., on August 16, 1984; and Brief in Support of Magistrate's Ruling, filed by Plaintiffs Joan Brown, et al., on August 16, 1984.

This discovery dispute arises from the service of a Request for Production of Documents and Things upon Messerschmitt by Plaintiffs. Subsequently, Plaintiffs filed a Motion to Compel Discovery, complaining of Messerschmitt's failure to comply with requests to produce certain documents located in the Federal Republic of Germany. On July 25, 1984, the Magistrate granted Plaintiff's Motion to Compel Discovery, in particular with respect to Requests for Production of Documents and Things Nos. 1, 2, 5, 6 and 7. Messerschmitt now seeks review in this Court pursuant to 28 U.S.C. 636(b)(1)(A) and Miscellaneous Order No. 6.

Messerschmitt's objection to the discovery request is based upon Plaintiff's failure to comply with the Hague Convention for Taking Evidence Abroad which establishes an international procedure for obtaining evidence in foreign jurisdictions. In particular, Messerschmitt emphasizes Plaintiffs' failure to comply with protocol by transmitting a Letter of Request to the proper authorities in the Federal Republic of Germany. Plaintiffs respond that compliance with the Convention is neither mandatory nor possible, since the Federal Republic of Germany has filed a reservation to the Convention which declares it will not execute Letters of Request for the purpose of obtaining pretrial discovery of documents.

Messerschmitt raises no objection as to the relevancy or scope of the discovery sought. Rather, the dispute between the parties focuses on the lack of compliance with the Hague Convention for Taking Evidence Abroad. The Magistrate recognized the current conflict in the authorities regarding the effect of such noncompliance on a litigant's efforts to obtain discovery. *See, e.g., Lasky v. Continental Products Corporation,* 569 F.Supp. 1227 (E.D.Pa. 1983) (requiring compliance of a West German defendant with the Federal Rules of Civil Procedure where the court had proper jurisdiction over the foreign entity); *Philadelphia Gear Corporation v. American Pfauter Corporation,* 100 F.R.D. 58 (E.D.Pa. 1983) (rejecting *Lasky* and requiring compliance with the Hague Convention despite reservation of Federal Republic of Germany). *See also Murphy v. Reifenhauser Kg Maschinenfabrik,* —— F.Supp. —— (D.Vt. 1984); *General Electric v. North Star International,* —— F.Supp. —— (N.D.Ill. 1984). The Magistrate determined that *Lasky* states the better rule in view of the current state of the law and the nonintrusive nature of the discovery sought by Plaintiffs; this Court concurs with the Magistrate.

The Court notes the cases currently before the Fifth Circuit, *In re Anschuetz & Co. GmbH.,* Cause No. 84-3286; and the United States Supreme Court, *Club Mediterranee, S.A. v. Dorin,* appeal filed, 52 U.S.L.W. 3210 (N.Y. App. Div. September 16, 1983) which may relate to the issue decided by the Magistrate. As Messerschmitt itself points out, however, such cases are still pending, and it would not serve the cause of effective judicial administration for this Court to delay ruling on a discovery matter until those cases are decided by the higher courts.

The Court is of the opinion that the Magistrate's ruling granting Plaintiffs' Motion to Compel Discovery is not "clearly erroneous or contrary to law", 28 U.S.C. § 636(b)(1)(A), particularly in view of the undisputed

relevancy and apparent reasonableness of Plaintiffs' Request for Production.

Accordingly, the Magistrate's Order should be, and it is hereby, AFFIRMED.

SO ORDERED.

DATED: September 12, 1984.

/s/ Barefoot Sanders
BAREFOOT SANDERS
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil No. CA-3-83-0199-H

Consolidated with
Civil No. CA-3-83-1765-H

VIRGINIA WALKER, ET AL.,
Plaintiffs

LONE STAR HELICOPTERS, *et al.*,
Intervenors

vs.

MESSERSCHMITT BOLKOW BLOHM,
GmbH. and MBB HELICOPTER CORP.
Defendants

[Filed July 25, 1984]

ORDER

Under authority of 28 U.S.C. § 636(b) and the Local Rules of this Court, plaintiffs' motion for partial stay of Magistrate's Order, filed June 21, 1984, and plaintiffs' motion to compel defendant Messerschmitt Bolkow Blohm GmbH. to respond to requests for production of documents and things, filed June 15, 1984, were referred to the Magistrate for hearing and determination. A hearing was held on July 16, 1984 and counsel for all parties were present. And having reviewed the said motions and

responses thereto, and having further reviewed the affidavits and other documents submitted in support thereof, and having heard the arguments of counsel,

IT IS THEREFORE ORDERED that plaintiffs' application for a partial stay of the Magistrate's Order be, and the same is, hereby denied, and plaintiffs shall serve complete answers to interrogatories and document requests within thirty (30) days of the date of this Order.

IT IS FURTHER ORDERED that plaintiffs' motion to compel defendant Messerschmitt Bolkow Blohm, GmbH. to respond to requests for production of documents and things be, and the same is, hereby granted, and defendant Messerschmitt Bolkow Blohm, GmbH. shall respond to requests for production of documents and things Nos. 1, 2, 5, 6 and 7 within thirty (30) days of the date of this Order. The parties have ably briefed and argued the important question presented by this motion, and, while there is a sharp conflict in the authorities, I believe that the better rule is that stated in *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E. D. Pennsylvania, 1983). Plaintiffs here seek only the production of documents and things; they do not seek to conduct discovery in the Federal Republic of Germany, nor do they seek to require affidavits to be made there. Defendants have suggested that plaintiffs must first submit letter requests to this defendant as required by the appropriate provisions of the Hague Convention, 28 U.S.C. § 1781. But the reservation by the Federal Republic of Germany which declares that it will not execute letters of requests for the purpose of obtaining pretrial discovery of documents establishes that such a request by plaintiffs here would be a futile gesture. Defendant acknowledges that MBB Helicopter Corporation, the other defendant in this case, is a wholly-owned subsidiary of this defendant. I believe that the fact that defendant has established a wholly-owned subsidiary in the United States and conducts business in the United States through such subsidiary requires

defendant to respond to reasonable discovery requests, such as the requests for documents which plaintiffs have made here.

IT IS FURTHER ORDERED that this Order be, and the same is, hereby stayed pending disposition by the Judge of this Court of any objections which may be made within the time provided by Rule 72(a) of the Federal Rules of Civil Procedure.

All relief not expressly granted herein is denied.

SIGNED this 25th day of July, 1984.

/s/ John B. Tolle
United States Magistrate

APPENDIX D

FEDERAL RULES OF CIVIL PROCEDURE

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a re-

sponse within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

APPENDIX E

MULTILATERAL

Taking of Evidence Abroad

Convention adopted at the Eleventh Session of The Hague Conference on Private International Law October 26, 1968;

Opened for signature at The Hague March 18, 1970;

Signed on behalf of the United States of America July 27, 1970;

Ratification advised by the Senate of the United States of America June 13, 1972;

Ratified by the President of the United States of America July 15, 1972;

Ratification of the United States of America deposited with the Ministry of Foreign Affairs of the Netherlands August 8, 1972;

Proclaimed by the President of the United States of America September 15, 1972;

Entered into force with respect to the United States of America October 7, 1972.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, adopted at the Eleventh Session of The Hague Conference on Private International Law on October 26, 1968, was opened for signature at The Hague on March 18, 1970, and was signed for the United States of America on July 27, 1970, the text of which in the French and English languages is annexed;

The Senate of the United States of America by its resolution of June 13, 1972, two-thirds of the Senators present concurring, gave its advice and consent to the ratification of that Convention;

The President ratified the Convention on July 15, 1972, and the instrument of ratification was deposited with the Ministry of Foreign Affairs of the Netherlands on August 8, 1972;

Article 37 of the Convention provides that it shall enter into force on the sixtieth day after the deposit of the third instrument of ratification; and

The Convention accordingly will enter into force for the United States of America on October 7, 1972, instruments of ratification having been deposited by Denmark and Norway on June 20, 1972 and August 3, 1972, respectively;

NOW, THEREFORE, I, Richard Nixon, President of the United States of America, proclaim and make public the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to the end that it shall be observed and fulfilled with good faith on and after October 7, 1972 by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this fifteenth day of September in the year of our Lord one thousand nine hundred seventy two and of
[SEAL] the Independence of the United States of America the one hundred ninety-seventh.

RICHARD NIXON

By the President:

WILLIAM P. ROGERS
Secretary of State

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions—

CHAPTER I—LETTERS OF REQUEST

ARTICLE 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

ARTICLE 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

ARTICLE 3

A Letter of Request shall specify—

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to the obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, inter alia—

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

ARTICLE 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

ARTICLE 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

ARTICLE 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter

shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

ARTICLE 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

ARTICLE 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

ARTICLE 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

ARTICLE 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by

its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

ARTICLE 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

ARTICLE 12

The execution of a Letter of Request may be refused only to the extent that—

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

ARTICLE 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to

the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

ARTICLE 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II—TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

ARTICLE 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he repre-

sents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

ARTICLE 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if—

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

ARTICLE 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

ARTICLE 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

ARTICLE 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

ARTICLE 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

ARTICLE 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence—

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evi-

dence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

ARTICLE 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III—GENERAL CLAUSES

ARTICLE 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining

pre-trial discovery of documents as known in Common Law countries.

ARTICLE 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

ARTICLE 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

ARTICLE 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may re-request from that State the reimbursement of similar fees and costs.

ARTICLE 27

The provisions of the present Convention shall not prevent a Contracting State from—

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

ARTICLE 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from—

(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

ARTICLE 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905 [1] and the 1st of March 1954, [2] this Convention shall replace Articles 8-16 of the earlier Conventions.

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[1] 99 *British Foreign and State Papers* 990.

[2] 286 UNTS 265.

ARTICLE 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

ARTICLE 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

ARTICLE 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

ARTICLE 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

ARTICLE 34

A State may at any time withdraw or modify a declaration.

ARTICLE 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following—

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) declarations pursuant to Article 4, 8, 11, 15, 16, 17, 18, 23 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

ARTICLE 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

ARTICLE 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

ARTICLE 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

ARTICLE 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice[1] may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

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[1] TS 993; 59 Stat. 1055.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

ARTICLE 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.[1]

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

ARTICLE 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affiairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

---

[1] Extended to Guam, Puerto Rico, and the Virgin Islands pursuant to notification sent by the American Embassy at The Hague on Feb. 6, 1913.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

ARTICLE 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following—

(a) the signatures and ratifications referred to in Article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 39 and the dates on which they take effect;

(d) the extensions referred to in Article 40 and the dates on which they take effect;

(e) the designations, reservations and declarations referred to in Article 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41.

IN WITNESS WHEREOF the undersigned being duly authorized thereto, have signed the present Convention.

DONE at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

Supreme Court, U.S.
FILED
SEP 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-99

In The

Supreme Court of the United States

October Term, 1985

MESSERSCHMITT BOLKOW BLOHM, GmbH.,

Petitioner,

v.

WALKER, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. DON GORDON
MUNSON, MUNSON, HYNDS, GORDON & PIERCE, P.C.
123 South Travis Street
P.O. Box 1949
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September 10, 1985

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QUESTION PRESENTED

Whether, on an application for discovery of evidence located abroad from a foreign national over whom the court has personal jurisdiction, a court in the United States may follow the Federal Rules of Civil Procedure without first resorting to the procedures of the Hague Evidence Convention,* by ordering that the production of the foreign documents take place in the United States.

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*Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature,* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and Germany on June 26, 1979).

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No. 85-99

In The

Supreme Court of the United States

October Term, 1985

MESSERSCHMITT BOLKOW BLOHM, GmbH.,

Petitioner,

v.

WALKER, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari filed in this cause on behalf of Messerschmitt Bolkow Blohm, GmbH., a German corporation, fails to demonstrate any sufficient reason why the decision of the United States Court of Appeals in the case of *In re Messerschmitt Bolkow Blohm GmbH.*, 757 F.2d 729 (5th Cir. 1985), should be reviewed by this Court. Respondents concede that "the role of the Hague Evidence Convention in United States litigation", as Petitioner phrases the issue, would be a question of some significance, but that is not the true issue raised by this case. Rather, the limited issue presented here is whether prior resort must be made to the

Convention in order to seek discovery from foreign parties subject to the jurisdiction of a United States court, even though the objects of discovery are physically located in the territory of a foreign signatory of the Hague Convention. *Messerschmitt*, 757 F.2d at 731. On this specific issue, there is a clear preponderance of authority, both federal and state, supporting the position of the Fifth Circuit. There is thus no need for this Court to settle any point of widespread disagreement or confusion. Also, the opinion of the Fifth Circuit should not be reviewed as it is demonstrably correct in its ruling: it enforces the language of the Convention itself, gives recognition to the position of the Federal Republic of Germany withholding full recognition to the Convention, and gives proper consideration to relevent principles of comity in this area of international relations.

This action is brought by the survivors and other beneficiaries of three individuals who died in a helicopter crash in April of 1982. The manufacturer of the helicopter, Messerschmitt Bolkow Blohm GmbH, appears in this action as the Petitioner. Also joined as defendant is MBB Helicopter Corporation (MBB), a Delaware and Pennsylvania corporation which is a wholly-owned subsidiary of Petitioner and which serves as the United States distributor of Messerschmitt's helicopters. 757 F.2d at 730. The presence of the American co-defendant should be particularly noted as this fact serves to distinguish the present case from that of *Anschuetz & Co., GmbH. v. Mississippi River Bridge Authority, et al.*, No. 85-98 (Petition for Writ of Certiorari filed July 17, 1985) in which the German defendant had no establishment or personnel in the United States. See *In re Anschuetz & Co., GmbH.*, 754 F.2d 602 (5th Cir. 1985).

Petitioner has admitted personal jurisdiction in the United States District Court for the Northern District of

Texas. 757 F.2d at 730. Nevertheless, Petitioner claims that the district court erred in ordering it to produce in the United States documents in its possession and physically located in Germany and in ordering it to produce for depositions in the United States the persons Petitioner may call as expert witnesses at the time of trial, which experts were designated to be employees of Petitioner residing in Germany. 757 F.2d at 730. Petitioner's position is that the Hague Evidence Convention is the exclusive procedure for obtaining discovery from a foreign national defendant, at least in the first instance.

There is nothing in the language of the Hague Convention demonstrating that it was intended to provide the sort of exclusivity which Petitioner suggests. Instead, the Convention specifically provides, in Article 27, that it "shall not prevent a Contracting State from — (c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention." Also, the Preamble to the Convention states that its purpose is to "improve mutual judicial cooperation in civil or commercial matters," as well as to "facilitate" the transmission and execution of Letters of Request.

Where discovery of documents from foreign parties subject to the jurisdiction of a United States Court is sought, the Federal Rules of Civil Procedure, not the Hague Convention, applies, and this is true "even though those documents are physically located in the territory of a foreign signatory of the Hague Convention." *Messerschmitt*, 757 F.2d at 731, citing *Anschuetz*, 754 F.2d at 611, n. 2. The district court was correct in this ruling, because in this situation the discovery should not be considered as taking place outside of the United States, and the Hague Convention is irrelevant *ab initio*.

If the drafters of the Hague Convention had desired the extreme result which Petitioner urges, they might easily have so indicated in plain language. Instead, there is no language whatsoever that speaks of exclusivity of the Convention's procedures and there is much that indicates the contrary.

> It is conceivable that the United States could enter into a treaty giving the other signatories such great power over American litigation, but a treaty intended to bring about this result surely would state its intention clearly, and surely would be much more precise in setting out such critical terms.

Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503 (N.D. Ill. 1984). Instead, the Convention enacts a clearly permissive procedure for assisting forum courts in obtaining evidence; it does not purport to limit the preexisting ability of litigants to obtain discovery in their forum courts.

The adoption of the Hague Convention by the United States cannot be interpreted as a restriction of jurisdiction over foreign nationals before a United States Court. Rather, the purpose of the Convention was clearly to enlarge the ability of litigants to obtain evidence from foreign parties in those instances where the forum court may *not* have *in personam* jurisdiction. Petitioner's position leads only to the contrary result: the discovery provisions of the Federal Rules of Civil Procedure would be effectively voided every time a lawsuit involved a litigant of a signatory State.

Despite the many cases cited by the Petitioner on this point, the Petition fails to disclose the type of conflict among the authorities which is normally said to justify review on writ of certiorari. See Supreme Court Rule 17. In particular, there is no conflict among the federal circuit courts of appeal alleged. The Fifth Circuit position, as

evidenced in *Anschuetz* and in the instant case, has not been disputed by any other circuit. It should also be noted that Petitioner's roster of "reported" cases ruling this issue in fact consists primarily of unreported and unpublished opinions, which opinions were never intended for publication, have no precedential value, and, in most instances, cannot be cited as authority in the federal circuits in which they arise. (Petition at 7, n. 7-9).

The closest Petitioner comes to finding a significant conflict among the authorities is in its citation of *Gebr. Eickhoff Maschinenfabrik und Eisengiebrei v. Starcher*, No. 16562 (W.Va. Mar. 22, 1985). But that case was decided almost contemporaneously with the instant case, and neither decision distinguishes the other. Respondents submit that it is clear that the Fifth Circuit position is the correct view of this issue, and that subsequent courts faced with similar issues will undoubtedly choose to follow its reasoning. Until it is shown that the West Virginia position will be followed by any other court, especially in light of the well-reasoned opinions of the Fifth Circuit, there has been shown no conflict among the courts sufficient to command the attention of this Court on writ of certiorari.

Respondent concedes that there are a significant number of cases presenting issues similar to the one raised on this appeal, but far from showing any need for guidance from this Court in this area, the most recent cases clearly show that the federal trial courts are not floundering in a sea of confusion but have instead reached a clear consensus. That consensus is, consistent with the position of the Fifth Circuit, that the Hague Convention is not the exclusive means of obtaining evidence from abroad. See, *e.g.*, *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Compagnie Francaise d'Assurance v. Phillips Petroleum Co.*, 105 F.R.D.

16 (S.D.N.Y. 1984); *Cooper Industries v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984); *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984); *Slauenwhite v. Bekum Maschinfabrik GmbH.*, 104 F.R.D. 616 (D.Mass. 1985).

Principles of Comity Do Not Require Review of this Case:

No true consideration of comity in international relations is raised by the opinion of the Fifth Circuit in this case. First, it must be remembered that the role of the Hague Convention in effecting discovery in West Germany is highly problematic. That country has declared that it will not allow compulsory pre-trial production of documents "as known in Common Law countries" under the Hague Convention. See Reservations and Declarations of the Federal Republic of Germany on the Adoption of the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, 6A Benedict on Admiralty 3-160.4 ff. Thus, even if a first resort to the provisions of the Hague Convention were ordered by this Court, such efforts would in most instances be a futile act.

Were the position of Petitioner to be accepted, there is a far greater likelihood that international comity would be frustrated rather than advanced. *Lasky v. Continental Products Corp.*, 569 F.Supp. 1227 (E.D.Pa. 1983). The history of the Convention clearly indicates that it was designed to supplement, not constrict, the Federal Rules of Civil Procedure. There is absolutely no indication that it was designed to shield foreign defendants from the discovery provisions of the federal rules.

Comity in this context requires the weighing of Germany's interest in maintaining control over its judicial system against the American interest in obtaining full pretrial dis-

covery. *Messerschmitt*, 757 F.2d at 732. The decision of the Fifth Circuit herein gives full weight to the valid American interest and does not genuinely infringe the German interest. As the opinion notes, "The district court's order does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany." *Id.*, 757 F.2d at 732. Since defendants are admittedly subject to the personal jurisdiction of the American court, requiring them to comply with such orders in aid of discovery is fully compatible with notions of fairness found in many legal systems. Simply put, parties who establish sufficient contacts with a forum so as to engage the jurisdiction of a court of that forum, must expect to comply with the requirements of the legal system of the jurisdiction with whom they have chosen to do business or otherwise establish contacts.

Finally, it should be noted that there is a question of ripeness regarding Petitioner's argument. Insofar as the Petition raises, as a basis for granting the writ, concerns over a trial court's ability "to compel, upon pain of monetary fines or other punishment for contempt, the production of evidence located abroad," the Petition is raising a question which is not yet ripe. (Petition at 15-16). No such order has been entered in this action, nor does the record reflect that one is contemplated. No sanctions or other penalties have been sought or granted. The trial court has only ordered that documents be produced and witnesses deposed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied, as Petitioner has shown no compelling reason why the case should be reviewed. The role of the Hague Evidence Convention in United States litigation has been definitively, and correctly, set by the Fifth Circuit Court of Appeals.

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Nos. 85-98 and 85-99

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANSCHUETZ & CO., GMBH,
Petitioner,
v.
MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,
Respondents.

MESSERSCHMITT BOLKOW BLOHM, GMBH,
Petitioner,
v.
WALKER, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' BRIEF IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEF FOR THE UNITED STATES

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' BRIEF IN RESPONSE TO THE SOLICITOR GENERAL'S BRIEF FOR THE UNITED STATES

INTRODUCTORY STATEMENT

Petitioners have requested this Court to decide whether the Hague Evidence Convention places any limits on the authority of U.S. courts to order the production of foreign documents or the examination of foreign witnesses

in the United States. In his brief for the United States as amicus curiae (hereinafter cited as "Br."), the Solicitor General adopts the same position that respondents took last August: The Court should deny certiorari because the decisions below are correct. Br. at 6, 20. Last August we replied: "Even if this were true, of course, it would in no way argue against the Court's granting certiorari to resolve a direct conflict among lower federal and state courts over a recurring issue of increasing importance to the administration of justice." 85-98 Pet. Reply Br. at 4. Strictly speaking, that observation is all the response that the Solicitor General's brief requires.[1]

Nevertheless, because of the conclusion that the Solicitor General seeks to draw from his position on the merits, we are constrained to burden the Court with a rather longer response. While expressly conceding the importance of the question we have presented, the Solicitor General attempts to establish that, when the merits are correctly understood, there is really no "meaningful" conflict among the state and lower federal courts. As we show herein, his effort to argue away the express disagreements among the courts over the applicability of the Hague Evidence Convention to foreign discovery is based in major part upon an understanding of the principle of comity that divests it of all legal content. In addition, as we further show, the Solicitor General incorrectly characterizes the positions on the merits adopted by the Fifth Circuit and by petitioners, further contributing to the erroneous impression created by his brief that there exists no substantive legal conflict over the important question presented in our petitions.

---

[1] We wish to advise the Court that while there have been no further proceedings in No. 85-98 since the decision below in that case, in No. 85-99 trial of the claims of the non-settling plaintiffs is scheduled to commence on April 14, 1986, without petitioner Messerschmitt having made production of the documents sought from Germany.

DISCUSSION

I. The question presented by petitioners is important because refusal to use Hague Evidence Convention procedures for extraterritorial discovery puts the courts of the United States in recurring and unnecessary conflict with the judicial sovereignty of other nations.

The Solicitor General does not question the importance of the question presented in these cases. To the contrary, in one of the few passages addressing whether the Court should review these cases rather than how the Convention should be interpreted or the principle of comity applied, the Solicitor General makes the following statement:

> "These cases present recurring questions concerning the use of the Hague Evidence Convention to obtain foreign evidence for use in private suits. We agree with petitioners that these questions are important."

Br. at 6. Naturally, the significance of this one simple statement tends to get lost in the elaborate discussion of the merits that occupies the remainder of the brief.

Since our last filing here in August 1985, the importance of what role the Hague Evidence Convention is or is not to play in U.S. judicial proceedings has been further underscored by governments of major U.S. trading partners. First, the Federal Republic of Germany has submitted a third diplomatic note to the U.S. government, firmly rejecting the position adopted in the Solicitor General's brief and adhering to its position that the decision below violates the international law protecting German sovereignty and should be reviewed by the Supreme Court of the United States.[2] Second, we refer the Court to a further diplomatic note, dated November 3, 1985, from the Government of France stating that na-

[2] This note and the second German note of November 26, 1985, are reproduced in Appendices 1 and 2.

tion's position that Hague Evidence Convention discovery procedures are obligatory under international law and reiterating its request that this Court review the decisions below.[3]

These communications from Germany and France, together with the diplomatic note from Great Britain (85-98 Pet. Reply Br. at 3a-4a), indicate that the foreign discovery technique authorized by the decisions below is regarded by other nations as violating international law and confirm that its use should not be permitted to continue without review by this nation's highest court. Appended to this brief is an explication of the international law principle reflected in the diplomatic interventions of Germany, France and Great Britain prepared for petitioners' liability insurer by the international law scholar Karl M. Meessen.[4]

The substantial attention and concern expressed by American trading partners over this case is all the more troubling because this international conflict is not required by any real clash of sovereign interests. In truth, there is no difference of interests between the United States and Germany here that could not be reconciled by taking recourse to the Convention that was, after all, negotiated by the Executive Branch, made binding U.S. law by ratification and (before the decisions here) frequently and successfully used by U.S. litigants seeking evidence from Germany. As set forth in our petitions, truly necessary evidence is likely to be obtained by use of the Convention. If for some reason it were not, however, U.S. courts could then consider what further action might be appropriate to ensure that litigants were treated fairly (and, of course, the German government could not at that point protest U.S. failure to try Convention pro-

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[3] This second French note, together with an informal translation, is reproduced in Appendix 3.

[4] Professor Meessen's analysis is contained in Appendix 4.

cedures). Unless this Court acts to correct the decisions below, the Convention will never be given the chance to play its role of eliminating the tensions that arise because of the different procedures used by the judicial systems of major Western nations with respect to obtaining evidence.

II. The Solicitor General attempts to minimize the conflict among the courts over the Hague Evidence Convention by reinterpreting both the legal doctrine of comity and the decisions of the Fifth Circuit.

While the Solicitor General does not question the importance of the question presented by these cases, he does claim that there is no "meaningful" conflict over it among the state and lower federal courts. Br. at 19 & n.24. The Solicitor General tries to make the conflict and confusion over the role of the Hague Evidence Convention disappear by pursuing two argumentative strategies.

First is the advocacy of a comity analysis that is so unstructured and ultimately devoid of substantive legal content that it generates no rule of decision for a court faced with a choice between discovery under the Evidence Convention or discovery under the Federal Rules. In the Solicitor General's brief, comity is a "principle" in name only, that by its nature cannot be inconsistently applied by different courts.

To diminish the significance of the express conflicts among the state and lower federal courts, it is not enough for the Solicitor General to posit his own open-ended notion of comity, for the plain meaning of the decisions below is that the Fifth Circuit understands comity quite differently from the Solicitor General. The Solicitor General is therefore forced to pursue a second strategy: deconstruction of the decisions below. Instead of laying down a clear (albeit, in our view, erroneous) rule governing the applicability of the Evidence Convention to for-

eign discovery, the Fifth Circuit is interpreted as providing no more guidance—no more *content* that another court (or nation) could agree or disagree with—than the Solicitor General's own standard-less comity analysis.

In this section of our brief we consider each of these remarkable arguments in turn.

A. The Solicitor General understands the doctrine of comity in non-juridical terms unsuitable to application of a legal principle by the Judicial Branch.

Foreign litigants and their sovereigns are now urging in federal and state courts that compulsory discovery of evidence located in their territory violates international law unless such discovery is conducted in conformity with the Hague Evidence Convention. In response to these claims, many U.S. courts have applied the principle of comity to determine the extent to which, if at all, the conflict between U.S. discovery and foreign sovereign interests should be resolved by substituting Convention discovery for discovery under the Federal Rules or comparable state rules.

State and lower federal court applications of the comity principle have resulted in two clear but conflicting positions: that first use of Convention procedures is normally required to discover information located abroad (*Starcher* and other cases cited at 85-98 Pet. 12 n.23), and that use of Convention procedures is not required so long as the foreign-located information is ordered to be produced within the United States (*Anschuetz* and cases cited at 85-98 Pet. 12 n.24). It is the conflict between these two inconsistent approaches—one of which, we submit, respects the Convention while the other emasculates it—that the Court is being asked to resolve in these cases.[5]

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[5] The third major position—that the Convention is the exclusive means of discovering foreign-located information (*see* cases cited at 85-98 Pet. 15 n.29)—rests largely on an interpretation of the

In stark contrast to these clear, administrable rules governing the substitution of Convention discovery for normal U.S.-style discovery, the Solicitor General's amicus brief urges adoption of a comity analysis that generates no rule at all. With respect to extraterritorial discovery, U.S. courts are counseled to evade foreign recrimination by being "flexible" and exercising their discretion to consider the "wide variety of factors that might be relevant in any particular instance." Br. at 12. Although we can find a list of "some" of these factors in the 1965 Restatement of U.S. Foreign Relations Law (*id.*), we must remember that these factors are finally "intractable" (Br. at 20) and that neither this Court nor any other appellate court can give any "additional specific guidance" on how to apply the principle of comity in any particular case in which foreign discovery is sought. Br. at 20; and *see id.* at 12, 14, 18-19.

Arrayed against this elusive notion of comity are the specific provisions of the Federal Rules of Civil Procedure enabling litigants to discover information, wherever located, that is within the control of any person over whom a U.S. court can assert personal jurisdiction. Thus, for the Solicitor General, there is no question but that the discovery orders entered here were "in accordance with the Federal Rules of Civil Procedure" (Br. at 1), that an "American court has the power to demand the production

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Convention rather than a comity analysis. Evidently the United States once understood the Convention as being exclusive. *See* Brief for the United States as Amicus Curiae at 6, *Volkswagenwerk A.G. v. Falzon*, 104 S.Ct. 1260 (*appeal dismissed*), *reh. denied*, 104 S.Ct. 1932 (1984): "The parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted." (We note that while Professor Meessen's analysis strongly supports, from the perspective of customary international law, our position on the first use of Convention procedures, it does not support the position advanced in the diplomatic notes, the Solicitor General's *Falzon* brief, and in our petitions (to which we adhere) that the Convention should be interpreted as providing the exclusive means for obtaining foreign evidence.)

of evidence in the United States from foreign nationals" (*id.* at 8), and that "American courts, of course, apply their own procedural rules to adjudicate" claims against foreign nationals. *Id.* Under the Solicitor General's approach to comity, the law does not recognize any special considerations applicable to foreign nationals in our courts; insofar as the exercise of U.S. discovery jurisdiction is moderated, it is a matter, not of law, but of grace alone. For the Solicitor General, the principle of comity is not really part of our "law" at all.

Obviously, if this Court can be persuaded that the principle of comity is so "intractable" that it amounts to nothing more than an admonition to think pragmatically about "international friction," then the lower court conflicts over the Evidence Convention's role in foreign discovery will indeed largely disappear as an issue for appellate resolution. If every case turns on the judge's individual reaction to a unique constellation of intractable factors, then it is going to be intractably difficult to argue, as we propose to do, that a particular case was rightly or wrongly decided as a matter of law, or that one decision really does or does not conflict with another.

The Solicitor General's understanding of comity may be entirely adequate and appropriate for the Executive Branch in its conduct of U.S. foreign relations (at least insofar as questions of international legal obligation do not intrude), but it is inadequate and inappropriate for resolving justiciable issues unavoidably arising in cases within the province of the Judicial Branch. Comity, in the legal sense, does not denote a diplomatic strategy for advancing U.S. national interests while avoiding or minimizing retaliation by foreign nations. That is a political understanding of comity. The legal concept of comity is a principle of conflict of laws, enabling courts to choose when and how far to apply domestic law, and when and how far, on the other hand, to recognize interests protected by foreign law. Comity, in the legal sense,

has been a generator of choice-of-law rules from its first appearance as Huber's third maxim from *De conflictu legum* in the margin of *Emory v. Grenough*, 3 U.S. (3 Dall.) 369 (1797), down to its use last Term in *Mitsubishi v. Soler*, 105 S.Ct. 3346 (1985), to determine whether an arbitration clause is enforceable in an international commercial contract, even if it would not be in a purely domestic context.[6]

When the question is whether foreign discovery should be accomplished by Hague Evidence Convention procedures rather than by the Federal Rules, comity as legal principle would not have courts merely consider everything they can think of, remain flexible, and avoid saying anything so definite that a foreign nation could understand what was going on and retaliate. Comity in its legal sense guides courts to principled decisions of conflicts questions of the kind posed in the instant cases. Following the classical formulation in *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), the courts of the United States should recognize and give effect in the United States to the laws of another nation (here, German law making the discovery of information located in Germany subject to German judicial supervision and German civil procedure), having due regard both to international duty and convenience (here, the procedures agreed to by the parties to the Hague Evidence Convention) and to the rights of U.S. citizens or of other persons who are under the protection of U.S. law (here, the legal procedures available to litigants in U.S. courts for the discovery of evidence needed to adjudicate their claims in accordance with American standards of justice).

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[6] For a discussion of the distinction between the legal and political interpretations of comity, see Maier, *Extraterritorial Jurisdiction At a Crossroads*, 76 Am. J. Int'l L. 280, 283-84, 303-16 (1984). For an explanation of how the analysis of comity factors generates choice-of-law rules, see Restatement (Second) of Conflict of Laws § 6, Comment *c*.

We urge that, upon analysis, the principle of comity will be seen to require first resort to Hague Convention discovery procedures. Respondents, in contrast, say that the comity principle permits ordinary discovery under the Federal Rules whenever a party is ordered to make production in the United States. Notwithstanding the Solicitor General's quite different view, we must insist that petitioners and respondents are having a justiciable dispute capable of resolution one way or the other by judicial application of a coherent legal principle.

B. The plain meaning of decisions below and other courts' readings of those decisions contradict the Solicitor General's argument that the Fifth Circuit did not hold that comity can be satisfied by ordering that production of foreign evidence occur in the United States.

The Solicitor General's task of minimizing the conflict over the Hague Evidence Convention among state and lower federal courts would have been far easier if the Fifth Circuit had taken the same indeterminate approach to comity in these cases as the Solicitor General now urges. Because it rather plainly did not, however, the Solicitor General must creatively reinterpret the decisions below. He sets the stage for this deconstruction by characterizing the decisions below as "essentially correct" (Br. at 6) or "ultimately correct" (*id.* at 13), though containing "some troublesome language" (*id.* at 6) and providing only a "rather cursory" comity analysis. *Id.* at 13. Then, in footnote 21 on page 17 of his brief, history is revised.

When the court below said in *Anschuetz*, in the second sentence of a paragraph beginning "we hold," that "[t]he Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules" (85-98 Pet. 26a; Br. at 4), it really meant to say, according to the Solicitor General, that "the

Convention is not exclusive." Br. at 17 n.21. To understand that the court is not deriving from the principle of comity a clear, administrable rule—which would be "plainly overbroad" (*id.*) and inconsistent with a flexible approach to an intractable problem—the Solicitor General urges that we view the court's "poorly phrased observation" "in context." *Id.* Let us do just that, beginning with the context to which the Solicitor General refers and then considering some of the context he ignores.

The Solicitor General's reinterpretation gains no support from the court's subsequent statement that use of Convention procedures "may" be ordered if "the discovery sought by Gijonesa of Anschuetz *in Germany* becomes particularly intrusive." 85-98 Pet. 26a (emphasis added). That statement is fully consistent with the plain meaning of the court's assertion that Convention procedures have no application when the discovered information is produced in the United States. Nor does the "brief comity analysis" (Br. at 17 n.21) undertaken by the Fifth Circuit in *Messerschmitt* contradict the court's clear, direct statement. That comity analysis, one must recall, led swiftly to the firm conclusion, repeatedly described as being the holding of *Anschuetz* (85-99 Pet. at 2a, 3a, 5a-6a, 6a-7a), that comity presents no obstacle to an order that "a party admittedly subject to the personal jurisdiction of a United States court produce [evidence] . . . in the United States." 85-99 Pet. 5a.

That exhausts the context in which the Solicitor General would have the Court view the statement that the Hague Evidence Convention does not apply when foreign-located information is ordered to be produced in the United States. But there is more context for that statement in the *Anschuetz* decision, such as the following:

> "We are aware, of course, that the district court in sustaining the magistrate's ruling, has ordered depositions. But where the district court's order is an order that discovery will be compelled only in the

United States, there can be no invasion of German sovereignty." (85-98 Pet. 12a n.13)

"[The Convention] is, on its face, addressed solely to the procedures to be used for the gathering of evidence within the borders of countries other than those in which the legal proceeding is pending. . . . No authority has been suggested for the notion that letters of request were ever used or requested to be used to enable litigants to obtain information within the very country in which they are litigating." (85-98 Pet. 14a n.19)

"We find particularly apt the [*Graco*] court's observation that the Convention does not require deference to a foreign country's judicial sovereignty over documents, people, and information—if this is really how civil law judicial sovereignty is understood—when such documents are to be produced in the United States." (85-98 Pet. 17a-18a)

"In essence, matters preparatory to compliance with discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention." (85-98 Pet. 18a)

"The district court should remember that Anschuetz may make available any documents and witnesses in Germany if this is more convenient to the parties without implicating German sovereignty. If Anschuetz is not voluntarily forthcoming in Germany, the court can order the production of documents and the examination of witnesses to occur in the United States to avoid any infringement upon German sovereignty." (85-98 Pet. 27a)

In light of the foregoing, petitioners regard as simple truth the Fifth Circuit's statement last December that in *Anschuetz* "we held that . . . the 'Hague Convention has no application at all to the production of evidence *in this country* by a party subject to jurisdiction of a district court pursuant to the Federal Rules.' " *In re*

Ljusne Katting, A.B., No. 85-2573 (5th Cir. Dec. 11, 1985), slip op. at 7-8 (emphasis in original).

Other courts have had no trouble understanding the so-called poorly-phrased observations in the decisions below. In a decision rendered in January of this year, the Eighth Circuit upheld a discovery order under the Federal Rules requiring production in the United States of documents and information located in France. The court stated:

> "[W]e agree with the analysis of the Fifth Circuit in *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985), (No. 85-98), that '[t]he Convention does not require deference to a foreign country's judicial sovereignty over documents, people, and information—if this is really how civil law judicial sovereignty is understood—when such documents are to be produced in the United States.'
>
> * * * *
>
> "Hence, we conclude that the Hague Convention does not apply to the discovery sought in this case 'because the proceedings are in a United States court, involve only parties subject to that court's jurisdiction, and ultimately concern only matters that are to occur in the court's jurisdiction, not abroad.' *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729, 731 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 84-99)."

In re Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 124-25 (8th Cir. 1986).[7] Other courts have equally well understood the decisions below.[8]

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[7] We are advised that a petition for a writ of certiorari to review the *Aerospatiale* decision will be filed in this Court on April 16, 1986.

[8] Contrary to the impression created by the discussion in footnote 21 of the Solicitor General's brief, all four of the lower court decisions cited there—including *Work* and *Griffis*—read the decision below as holding that the Evidence Convention has no applica-

In sum, the Fifth Circuit holds, as do some other courts, that where production occurs in the United States, Hague Convention procedures have no application to party discovery of foreign-located information. The West Virginia Supreme Court holds, as do some other courts, that first resort must be made to Hague Convention procedures for party discovery of foreign-located information. The rules established by these holdings conflict both with each other and with the Solicitor General's position that no rule, but only a "flexible" approach, should govern the discovery of evidence located abroad.

III. Contrary to the Solicitor General's statements, petitioners (i) do not urge that first use must be made of the Hague Evidence Convention in every case involving foreign discovery and (ii) do dispute the scope and relevance of the discovery sought in these cases.

We have two further and final comments about the Solicitor General's brief.

First, we reject the statement that we and the Federal Republic of Germany assert "the broad proposition that principles of international comity obligate American courts to seek first use of the Hague Evidence Convention in *every* instance where litigants seek discovery abroad." Br. at 14 (emphasis in original). Obviously, comity requires first use of Convention discovery procedures only where, as in the instant cases, normal U.S. discovery would violate foreign sovereignty—*i.e.*, fail to recognize the legislative, executive or judicial acts of the foreign nation that govern the disclosure or non-disclosure of information located within its territory.[9] Moreover, the

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tion to party production in the United States of foreign-located information.

[9] While the Solicitor General purports not to understand the "precise nature of Germany's 'judicial sovereignty'" as it is affected by U.S.-style discovery (Br. at 15 n.18), enlightenment can be obtained from the sources elsewhere cited by the Solicitor Gen-

comity principle in U.S. law, which mandates a due regard for the rights of its own citizens and other persons under the protection of its laws, obviously will not require litigants in U.S. courts to use Convention procedures in any instance in which such procedures would be futile and fail to "provide a meaningful tool for U.S. litigants to obtain discovery from abroad." 85-98 Pet. Reply Br. at 5; Appendix 4, pp. 19a-25a.

Second, we caution the Court against the misunderstanding inherent in the statement that "[p]etitioners do not presently dispute the scope or relevance of the evidence sought." Br. at 16. Obviously, petitioner Anschuetz objected and continues to object, see 85-98 Pet. Reply Br. at 2-4, to producing information of the breadth and irrelevance called for by the Rule 34 document discovery requests described in footnote 2 on page 4 of our petition in No. 85-98. Moreover, Anschuetz objects to making its employees living and working in Germany available for Rule 30(b)(6) depositions unsupervised by a German judge, whether those depositions occur in Kiel (as the district court ordered) or in New Orleans (as the court of appeals would have it). Likewise, petitioner Messerschmitt's inability to object on Rule 26(b) grounds to the document discovery sought from it (85-99 Pet. 11a) should not be taken to mean that Messerschmitt does not object to producing the documents; it does.

It is not petitioner's satisfaction with the discovery ordered in these cases that has caused them and the Federal Republic of Germany to pursue all the way to this Court the claim that respondents' discovery requests for information located in the territory of Germany

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eral himself (Br. at 6 n.5) and, especially, from the section of Professor Meessen's analysis entitled "German Interests." Appendix 4, pp. 32a-38a.

should be made, at least in the first instance, through Hague Evidence Convention procedures rather than under the Federal Rules. Precisely because they object to the overbreadth and irrelevance of the discovery against them permitted under the Federal Rules, they have urged that respondents be required to use instead the discovery procedures of the Convention. The Convention procedures will, petitioners submit, yield relevant, admissible evidence necessary to adjudicate respondents' claims but, because of the involvement of a German judge applying German law as to "the methods and procedures to be followed" (Art. 9) and any "privilege or duty to refuse to give the evidence" (Art. 11), will not permit a fishing expedition into information in Germany about which the most that can be said is that it is reasonably calculated to lead to the discovery of admissible evidence.

CONCLUSION

Accordingly, petitioners respectfully submit this brief for the Court's consideration and, referring particularly to the appended diplomatic notes from Germany and France, renew their requests that the petitions for writ of certiorari be granted.

Respectfully submitted,

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April 11, 1986

APPENDICES

APPENDIX 1

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to make the following comments on the amicus curiae brief for the United States in the matters of Anschuetz & Co. GmbH., petitioner, v. Mississippi River Bridge Authority, et al., and Messerschmitt-Boelkow-Blohm, GmbH., petitioner, v. Virginia Walker, et al.

The Embassy has taken note, with surprise, of the US Government's recommendation to the US Supreme Court not to grant certiorari in a matter on which the Federal Republic of Germany has, throughout the years, continuously expressed its grave concern.

In its brief, the US Government seriously underestimates the German Federal Government's resolve concerning German judicial sovereignty which is embedded in the German constitution, and, therefore, cannot be waived by the government. Whether evidence is to be taken on German territory or taken from German territory to another country, the German parties or witnesses concerned have a constitutional right that a German judge supervise the process of taking evidence lest certain fundamental rules of German law be violated.

The respect of another country's judicial sovereignty is the very principle of international law upon which all international treaties on judicial assistance are based and which the Federal Republic of Germany hoped to see observed by the United States when becoming a party to the Hague Evidence Convention.

Furthermore, the US Government's brief fails to take account of the fact that evidence taken in the Federal

Republic of Germany under the procedure of the Hague Evidence Convention can be utilized in American courts.

Verbatim transcripts of witnesses' testimony can be taken and American parties may be present and ask questions at court hearings. Although the taking of documentary evidence is not yet possible in the Federal Republic of Germany during the pre-trial stage, witnesses may be questioned by German courts on the contents of documents located in the Federal Republic of Germany to the extent such documents are relevant to the litigation. The practice of substituting the testimony of witnesses for pre-trial production of documents has in the past been used by US parties seeking evidence in the Federal Republic of Germany.

Thus, through exhausting convention procedure, infringement upon German sovereignty can be avoided without impairing the US interest in granting US plaintiffs such access to evidence as they may need to obtain proof for their claims against German defendants.

The Federal Republic of Germany continues to support petitioners' request in Anschuetz that the US Supreme Court grant certiorari and render a decision taking into account the respect of other countries' sovereignty which is the fundamental principle on which international law is based.

Washington, D.C., April 8, 1986

APPENDIX 2

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and, referring to its various discussions with the Department on the *Anschütz* case, has the honor to point out, once again, that the decision in this case relating to the applicability of the Hague Evidence Convention, will be of cardinal importance for further legal relations between the Federal Republic of Germany and the United States.

Therefore, there is an urgent need that certiorari be granted by the US Supreme Court for allowing review of the decision of the US Court of Appeals for the Fifth Circuit which has led German-American judicial assistance in civil and commercial matters into an impasse.

The Federal Minister of Justice is in the process of preparing regulations which will enable German courts to execute requests for production of documents under the Hague Evidence Convention. They will follow the lines of the restricted reservation which Great Britain has made to article 23 of the Convention.

Such regulations would be based upon § 14 paragraph 4 of the German statute of December 22, 1977 (BGBl I 3105) on the implementation of the Hague Evidence Convention. They require the consent of the Bundesrat i.e. the Länder Chamber of the German Parliament.

The Ministry of Justice has already been discussing the regulations with representatives of the Länder. However, the discussions are now stagnating in view of the holding of the court of appeals which limits the Convention's applicability to non-party witnesses, for, the restrictive interpretation which the court of appeals put

on the Convention, would make such regulations meaningless.

The regulations would have the practical effect to restrict the German reservation so as to enable German courts to render judicial assistance for pre-trial discovery of documents to the extent that the fundamental principles of German Law of Procedure are not violated (see article 9 paragraph 2 of the Convention).

If, however, the holding of the court of appeals were to stand, the Convention would only very rarely be used, as requests for judicial assistance usually involve party witnesses.

Even after the liberalized procedures for executing pre-trial discovery of documents requests will be applicable, US courts, relying on the Anschütz decision, could refuse to use them. Thus, the regulations would not have achieved their purpose.

Furthermore, the holding of the Fifth Circuit Court of Appeals seriously affects the reciprocity in international legal assistance intended by the Convention. German courts would continue to honor requests concerning party witnesses made under the Convention, while US courts will be able to deny such assistance on the grounds that the Convention is not applicable.

The Embassy would be very grateful to the Department of State for bringing the above considerations to the attention of the US Department of Justice.

Washington, D.C., November 26, 1985

Department of State
Washington, D.C.

APPENDIX 3

Ambassade de France aux Etats-Unis
Washington, D.C.

3 Novembre 1985

L'Ambassade de France présente ses compliments au Département d'Etat et, se référant à la note de l'Ambassade du 4 août 1985, a, sur instruction de son Gouvernement, l'honneur de lui faire savoir ce qui suit.

Dans sa note précitée, l'Ambassade avait appelé l'attention des autorités américaines sur le vif désir des autorités françaises de voir la Cour Suprême des Etats-Unis accepter d'examiner le recours de deux sociétés allemandes, Anschuetz et Cie et Messerschmitt Bolkow Blohm, en raison des implications directes que ces deux affaires ont sur l'interprétation et l'application de la Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale.

Les autorités françaises souhaitent souligner à nouveau l'importance qui s'attache au respect de la convention du 18 Mars 1970, qui constitue, dans les relations entre les Etats parties, le seul moyen juridique pour obtenir des preuves en matière civile ou commerciale pour les nécessités d'une procédure judiciaire.

Elles rappellent tout d'abord que l'entraide judiciaire internationale ne peut s'exercer que dans le respect de la souveraineté de chaque Etat et plus particulièrement du principe de la territorialité des lois qu'en conséquence le fait pour une autorité judiciaire d'un Etat d'exiger la communication de documents ou de renseignements se trouvant placés sous la juridiction d'un Etat étranger, sans l'autorisation de ce dernier et sans respecter les procedures en vigueur dans cet Etat, constitue, au regard du droit international, une atteinte à la souveraineté dudit Etat.

C'est pour éviter cet écueil et pour permettre l'établissement d'une nécessaire coopération en matière judiciaire entre Etats souverains qu'a été conclue la Convention de la Haye du 18 mars 1970. Un examen du texte de cette convention montre clairement que les demandes d'obtention de preuves civiles ou commerciales par une autorité judiciaire d'un Etat partie à la convention sur le territoire d'un autre Etat également partie ne sont recevables par la partie requise que si ces demandes sont formulées dans le respect des conditions strictes établies par la convention, ce qui constitue une reconnaissance de la souveraineté judiciaire de l'Etat requis.

L'article 27 de la Convention confirme encore cette conception :

Cet article stipule que les dispositions de la présente convention ne font pas obstacle à ce qu'un Etat contractant :

c) permette, aux termes de sa loi ou de sa coutume interne, des méthodes d'obtention de preuves autres que celles prévues par la présente convention.

Cette formulation négative prouve que la recherche de preuves civiles ou commerciales par des moyens non prévus par la convention est effectivement subordonnée au consentement de l'Etat requis. Elle signifie, en définitive, que tout ca qui n'est pas expressément prévu par la convention ou par la législation de l'Etat requis est interdit.

Il apparait ainsi que la Convention du 18 mars 1970, est, à défaut d'une autorisation explicite de l'Etat requis, le passage obligé pour obtenir entre Etats parties des preuves en matière civile ou commerciale en vue de procédures judiciaires.

Les autorités françaises souhaitent en outre souligner que le Parlement français a voté le 16 juillet 1980 une loi qui interdit la recherche de documents ou renseigne-

ments d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de procédure judiciaires ou administratives étrangères ou dans le cadre de celles-ci. Toutefois cette loi réserve l'application des procédures prévues par les accords internationaux auxquels la France est partie et valorise ainsi ces accords, tout particulièrement la convention de La Haye.

C'est pour toutes ces raisons que les autorités françaises considèrent qu'il est dans l'intérêt commun de veiller au respect des dispositions de la Convention de La Haye. Elles réitèrent en conséquence auprès du Département d'Etat leur souhait de voir la Cour Supréme des Etats-Unis accepter les deux recours sus-mentionnés.

L'Ambassade de France saisit cette occasion pour renouveler au Département d'Etat les assurances de sa très haute considération.

DEPARTMENT OF STATE
DIVISION OF LANGUAGE SERVICES

(Translation)

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French

Embassy of France in the United States

Washington, November 23, 1985

The Embassy of France presents its compliments to the Department of State and, in reference to the Embassy's note of August 4, 1985, on instructions of its Government, has the honor to inform it of the following:

In the aforementioned note, the Embassy called to the attention of the United States authorities the strong wish of the French authorities that the United States Supreme Court agree to examine the appeal of two German firms, Anschuetz and Co. and Messerschmitt Bolkow Blohm, because of the direct implications that these two cases have on the interpretation and application of the Hague Convention of March 18, 1970, on the taking of evidence abroad in civil or commercial matters.

The French authorities wish to reiterate the importance they attach to compliance with the Convention of March 18, 1970, which constitutes, in relations between the States parties, the only legal means of obtaining evidence in civil or commercial matters for the requirements of a judicial procedure.

They recall first that international judicial assistance can take place only with respect for the sovereignty of each State and particularly for the principle of the territoriality of laws, and consequently for a judicial authority of one State to demand the production of documents or information that are under the jurisdiction of a foreign State, without its authorization and without

respecting the procedures in force in that State, would constitute under international law an infringement of the sovereignty of that State.

It was in order to avoid this difficulty and make it possible to establish the necessary cooperation in judicial matters between sovereign States that The Hague Convention of March 18, 1970, was concluded. An examination of the text of this Convention clearly shows that requests for the production of civil or commercial evidence by a judicial authority of a State party to the Convention in the territory of another State party are not admissible by the requested Party unless such requests are formulated in conformity with the strict conditions established by the Convention, which constitutes recognition of the judicial sovereignty of the requested State.

Article 27 of the Convention reconfirms this concept:

This article stipulates that the provisions of the present Convention shall not prevent a Contracting State from:

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

This negative wording proves that the search for civil or commercial evidence by means not covered by the Convention is indeed dependent upon the consent of the requested State. In the final analysis, it means that whatever is not expressly covered by the Convention or by the laws of the requested State is prohibited.

Thus it appears that the Convention of March 18, 1970, in the absence of explicit authorization by the requested State, is the obligatory channel for obtaining evidence between States parties in civil or commercial matters for purposes of legal procedures.

The French authorities also wish to emphasize that on July 16, 1980, the French Parliament enacted a law that prohibits the search for documents or information of an economic, commercial, industrial, financial, or technical nature for the purpose of compiling evidence for foreign judicial or administrative procedures or in the context of such procedures. However, this law retains the application of the procedures provided for in the international agreements to which France is party and thus confirms such agreements, particularly The Hague Convention.

For all these reasons the French authorities consider it in the common interest to ensure that the provisions of The Hague Convention are respected. Consequently they reiterate to the Department of State their wish to have the United States Supreme Court hear the two aforementioned appeals.

[Complimentary close]

[Initialed]

APPENDIX 4

Karl M. Meessen [1] March 31, 1986

THE INTERNATIONAL LAW ON TAKING EVIDENCE FROM, NOT IN, A FOREIGN STATE:

THE ANSCHÜTZ AND MESSERSCHMITT OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.[2]

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[1] Dr. iur.; Professor of Public Law, International Law and European Law at the University of Augsburg, Federal Republic of Germany; currently Visiting Professor of International Law at the Law School of the University of Chicago; Special Consultant on International Economic Law to the American Law Institute regarding the Restatement of the Foreign Relations Law of the United States (Revised).

[2] *In re Anschuetz Co. GmbH*, 754 F.2d 602 (5th Cir. 1985); *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985). Upon petitions for certiorari, both cases are presently pending before the United States Supreme Court. The following opinion has been prepared in view of those proceedings at the request of Gerling-Konzern Allgemeine Versicherungs-Aktiengesellschaft, Cologne, Federal Republic of Germany. Gerling is the insurer of product liability risks to both petitioners.

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I. Summary

As indicated by diplomatic interventions of the German, British and French governments, the Anschütz and Messerschmitt cases raise serious issues of international law. From the point of view of international law, the opinions below can in fact not be upheld. Correction may result from applying U.S. procedural law in conformity with international law as the law of the land or, preferably, from reconsidering the application of comity under U.S. law in a manner that is in accordance with the underlying rule of international law. If, for whatever reason, conformity with international law is not reached, the U.S. would be liable towards Germany under the international law of responsibility.

The relevant rule of international law does not directly derive from the Hague Evidence Convention which is inconclusive as to its relation to such domestic procedures of taking evidence as are under review here. But the Convention or, more precisely, the availability of Convention procedures is of indirect importance under the controlling rule of customary international law which is: In exercising its procedural jurisdiction, a state has to accommodate conflicting foreign state interests, especially by adopting compromise solutions designed to reconcile domestic and foreign interests.

The foregoing rule reflects the common denominator of views, held in practice and legal doctrine, on the broader problem of extraterritorial jurisdiction. Causing the transfer of evidence from a foreign state to be produced before domestic courts is an instance of exercising extraterritorial jurisdiction.

To apply that rule of customary international law, an assessment of German and U.S. interests has to be made not unlike applying comity principles under U.S. law. In doing so, two factors which, it is submitted, the court below failed to understand have to be taken into consideration:

(1) Germany's interest in the protection of its judicial sovereignty would be seriously affected if evidence were removed from German territory as a result of U.S. court orders to that effect. Parties and witnesses residing in Germany are, under the German constitution, entitled to expect the taking of evidence to be operated by German courts.

(2) The U.S. has an interest in granting plaintiffs before U.S. courts access to the necessary evidence even as regards foreign defendants controlling evidence located abroad. But that interest may well be served by first taking recourse to Convention procedures which, as German-U.S. practice of legal assistance has demonstrated, offer access to the contents of documents even at the pretrial stage so that the production of documents themselves could be ordered for trial.

In reconciling those interests, the above rule of customary international law requires plaintiffs to proceed as follows: In the present first phase of litigation, plaintiffs have to use the channels of the Convention. If, contrary to experience, plaintiffs still need further evidence to prepare trial, there is time for U.S. courts, in a second phase, to come back to the question of ordering, at the request of plaintiffs, the transfer of evidence from Germany to the U.S.

II. The International Law Issues in Anschütz and Messerschmitt

In both Anschütz and Messerschmitt, product liability suits have been brought against the German manufacturers of boat steering devices (Anschütz) and of helicopters (Messerschmitt). Defects of an Anschütz steering device allegedly contributed to the collision of a Spanish owned vessel with a ferry landing at the mouth of the Mississippi River, causing damage to the landing and several other boats. Defects of a Messerschmitt helicopter allegedly contributed to a crash, near McKinney, Texas, in April 1982, causing the death of three occupants.

The district courts, finding to have personal juristion over the respective defendant, ordered the production of documents located in Germany and the deposition of some of each defendant's employees also located in Germany. According to the Anschütz opinion, the evidence is to be taken in the United States "[i]f Anschütz is not voluntarily forthcoming in Germany." [3] In Messerschmitt, that condition already formed part of the opinion of the district court which was confirmed by the court of appeals.[4]

Both cases are not on taking evidence in a foreign state. They are on taking evidence from a foreign state. The witnesses and the documents would have to be transferred from Germany to the United States for the purposes of taking evidence in the United States. If the court orders were to be confirmed, the German defendants would, in case of non-compliance, face sanctions which could be enforced within U.S. territory as long as the defendants own property there. The enforceability of the U.S. orders is not open to doubt. The question, however, is whether ordering the transfer of the evidence is in conformity with international law.

International law comes in as treaty law. The Federal Republic of Germany and the United States of America are both parties to the Convention on Taking Evidence Abroad in Civil or Commercial Matters which was signed at the Hague on March 18, 1970 and which is, therefore, often referred to as the Hague Evidence Convention. The court of appeals denied the Convention to have an impact on the application of the U.S. Federal Rules of Civil Procedure. That conclusion will be reexamined under the aspect of treaty law in Section III of this opinion.

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[3] Anschütz, at 615.

[4] Messerschmitt, at 730.

Customary international law comes in as well. Causing conduct in Germany, that is causing the transfer of evidence that would in Germany be exclusively for German courts to order, may have affected Germany's judicial sovereignty. The court of appeals, applying comity principles of U.S. law, did not find an infringement of German sovereignty as long as the evidence was not actually taken in Germany without German consent. Whether the mere absence of physical intrusion really removes the possibility of any violation of customary international law protecting German sovereignty, will be discussed in Section IV.

A violation of customary international law, as it will indeed be established, may be avoided by reconsidering the application of comity principles of U.S. law. A short observation to that effect in Section V will conclude the opinion.

It may be noted at this point that the violation of the customary international law rule protecting German sovereignty could only have been waived by Germany itself and not by any of its nationals.[5] Far from waiving any right, the German government intervened as amicus curiae in Anschütz, which came to be considered the lead case, and voiced protests on the diplomatic level. The international law issue has not become moot.

III. Treaty Law: The Hague Evidence Convention

The Hague Evidence Convention entered into force for the Federal Republic of Germany on June 26, 1979.[6]

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[5] For a similar view cf. Pierburg GmbH and Co., KG v. Superior Court of Los Angeles County, 186 Cal. Rptr. 876, at 882 (1982); Coopers Industries Inc. v. British Aerospace Inc., No. 83 Civil 6366 (DNE) (S.D.N.Y. 1984).

[6] Bekanntmachung über das Inkrafttreten des Haager Übereinkommens über die Beweisaufnahme im Ausland in Zivil oder Handelssachen vom 21. Juni 1979, Bundesgesetzblatt 1979, Teil II, 780.

As of that date, the Convention is binding upon both states involved in the present dispute since the U.S. had already become a party to the Convention as of October 7, 1972.[7] In the following, the availability of procedures of taking evidence in Germany under the Hague Evidence Convention (Convention procedures) will be discussed at first (Subsection 1). Afterwards the discussion will turn to the question of whether the availability of Convention procedures is in any way limiting access to U.S. procedures of taking the evidence from Germany (Subsection 2). The analysis will be conducted as a matter of treaty interpretation only. The impact which the availability of Convention procedures may have under customary international law or under U.S. law will be examined in Section IV and V respectively.

1. Availability of Convention Procedures

In Anschütz, the court of appeals stated: "The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules."[8] This is correct but beside the point: It is correct that the Hague Evidence Convention provides for various procedures of taking evidence in a foreign state, while no procedures of taking evidence from a foreign state are provided for under the Convention. Yet the question is whether Convention procedures, if available, should be used instead of taking recourse to U.S. procedures to transfer to the U.S. witnesses residing in Germany and documents located in Germany. The whole argument depends on whether Convention procedures are indeed available in the instant cases. That question will, therefore, have to be examined before any conclusions could be drawn regarding the impact on access to U.S. procedures. Availability of convention procedures is, in

[7] 23 U.S.T. 2555, T.I.A.S. No. 7444.

[8] Anschütz, at 615.

this context, understood to signify first that the convention is applicable at all and second that its procedures are suited to produce the evidence sought for in the particular case.

The applicability of the Convention follows from just one requirement: The presence of a civil or commercial matter. The instant claims for damages, based on product liability, qualify as such civil or commercial matter. In that respect, the court of appeals rightly expressed no doubt in either case.

The passage from Anschütz quoted above and some accompanying language could be understood to deny the applicability of the Convention whenever the domestic court finds personal jurisdiction over a party-witness. The Convention, however, does not make the absence of personal jurisdiction a requirement of its applicability. From the U.S. law point of view, Bernhard H. Oxman argued: "The decision to assert in personam jurisdiction over a foreign defendant in a civil action does not, and should not, involve a detailed enquiry as to the reasonableness of subjecting that person's property, employees, and affiliates throughout the world to the compulsory power of the court." [9] From the point of view of international law, as may be added, limiting the applicability of the Convention to cases in which municipal law does not extend in personam jurisdiction to the respective witness would hardly make sense. There may well be situations in which evidence located abroad could only be reached through the channels of the Convention even though personal jurisdiction may be present, e.g. when a sanction could not be enforced for lack of property located within the state attempting to take the evidence.

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[9] Bernhard H. Oxman, The Choice between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention, 37 UnivMiamiLRev 733, at 740 (1983).

In Anschütz and Messerschmitt, the Convention is brought into play by the foreign location of the information on the products in question. The practical availability of such procedures, however, will have to be assessed in some detail, first regarding the depositions demanded by plaintiffs (Subsection 1 a) and then regarding the orders for the production of documents (Subsection 1 b).

a) The Taking of Depositions

In both cases, plaintiffs are requesting the deposition of expert witnesses belonging to the personnel of the defendant manufacturer. Could such depositions be handled through the channels of the Convention? That question does not relate to the procedures of taking of evidence "without compulsion" by diplomatic officers under Chapter II of the Convention.[10] In view of the objections raised by Anschütz and Messerschmitt, it only relates to legal assistance under Chapter I of the Convention. In proceeding under Chapter I, the following points have to be considered:

Letters of request may under Article 1 (2) "not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated." That requirement seems sufficiently broad to cover even requests for discovery at the pretrial stage if the discovery is at all directed towards the objectives of the pending action. It may be assumed that the district courts ordering the discovery made sure of that requirement to have been met.

Article 3 of the Convention sets forth a number of formal requirements for specification of the request. Un-

[10] In addition to the Convention, see German note to U.S. Embassy in Bonn of October 17, 1979, and U.S. note to German Foreign Office of February 1, 1980, both published in: Bruno A. Ristau, International Judicial Assistance (Civil and Commercial), vol. II, at C I-78 et seq.

der that provision, U.S. judges may find themselves in a situation not familiar to them when having to specify the necessary evidence at a very early stage of the proceedings. Such scrutiny appears to be the price the U.S. had to pay for having its system of discovery included into a convention only dealing with the taking of evidence in its more narrow meaning. To provide that specification does not place an undue burden on U.S. courts. In practice, pretrial conferences might serve as an appropriate institutional framework.

Under Article 9 (1) of the Convention, Germany is, when executing a letter of request, entitled to apply its own procedural law regarding the form of taking the evidence. But at the request of the U.S., Germany would have to adapt its procedures to U.S. procedures unless entirely impractical or prohibited by German law (Article 9 (2)). Thus a German court would take verbatim records instead of having the judge summarize the statement made by the witness as is usual practice in Germany.

To be sure, Article 11 (1) (a) retains to witnesses deposed in Germany all the privileges of German law. In the instant cases, it is difficult to predict whether any of the grounds for refusing to testify as listed in Sections 383 and 384 of the German Code on Civil Procedure could become relevant. But, even if, for instance, an employee should under those provisions refuse to answer a specific question arguing that the answer might be evidence in support of claims against the witness himself, such refusal would be a significant fact allowing the U.S. court to draw its own conclusions. The protection of business secrets under Section 384 no. 3 of the German Code on Civil Procedure is usually construed narrowly. Whether it could bar disclosure of information regarding products manufactured quite some time ago, as was the case in Anschütz and in Messerschmitt, is doubtful. Prod-

uct liability suits before German courts are nothing out of the ordinary.

Finally, Article 12 (1) (b) authorizes Germany, being the requested state in the instant cases, to refuse to execute an eventual letter of request, if it "considers that its sovereignty or security would be prejudiced thereby." Neither product seems to be particularly sophisticated as to qualify as a matter of German security, and Germany could surely not invoke its "judicial" sovereignty when asked to execute a letter of request under a binding international treaty. Nor did the German government refer to any other element of its sovereignty as being affected.

To sum up, a request for the taking of depositions in Germany has a fair chance of being executed once the requesting courts make sure that questions to witnesses be specified in an adequate manner. Such prognosis seems confirmed by the astonishing extent to which Convention procedures have been used in German-U.S. practice shortly upon the Convention's entry into force: According to information supplied by the German Government in its amicus brief, 151 requests from U.S. courts were received in Germany during the period of 1979 to 1984. 131 of these requests were accepted and executed. Most of the 20 requests which were rejected either did not sufficiently identify the evidence to be taken or were for production of documents at the pretrial stage.[11]

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[11] Anschütz und Co. GmbH v. Mississippi River Bridge Authority, et al., No. 85-98, Supreme Court of the United States, Petition for writ of certiorari, Brief for the Federal Republic of Germany as amicus curiae of August 1, 1985; a scholarly investigation, privately undertaken for the same period, revealed a lower total, but about the same proportion of requests granted in relation to requests denied: 63 to 12 (Harald Koch, Zur Praxis der Rechtshilfe im amerikanisch-deutschen Prozessrecht, Ergebnisse einer Umfrage zu dem Haager Zustellungs- und Beweisübereinkommen, 5 Praxis des Internationalen Privat- und Verfahrensrechts, 245, at 247 (1985)).

b) The Production of Documents

In both cases, orders of taking evidence by way of production of documents were approved by the court of appeals. Could those orders be channeled through the Convention procedures as well?

Among the 17 contracting states (by the end of 1984), Germany is one of the 13 states to have made a declaration under Article 23 of the Convention to the effect that execution of letters of requests "issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries" is severely restricted or excluded altogether. Germany, indeed, unmistakingly declared: "Requests for judicial assistance having as their object a procedure as defined in Article 23 of the Convention will not be executed." [12] In addition, the Federal Minister of Justice was authorized to adopt, with the consent of the Federal Council, a representation of Länder governments serving as a second chamber of parliament, a regulation providing for the execution of such requests to the extent that "they do not violate basic principles of German procedural law, and . . . that the legal interests of the individual involved are taken into account." [13] Such regulation not yet having been adopted, requests for the production of documents in Anschütz and Messerschmitt would not be executed at the present pretrial stage of the proceedings.

The practical impact of the foregoing conclusion, however, has to be seen in the light of two alternatives to requests for the production of documents at the pretrial stage: Such requests could be substituted by depositions to be taken at the present pretrial stage, or the production of documents could be requested later at the trial stage of the proceedings. Both alternatives merit further exploration.

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[12] Bundesgesetzblatt 1977 Teil II, 3105, as translated by Bruno A. Ristau (note 10), at CI-84.

[13] Id., note 12.

In German court practice, it is common to hear witnesses as to the contents of special documents they have access to. For most practical purposes, therefore, a request for production of documents may be replaced by a request for deposing a witness on questions such as the minutes of meetings, the contents of instructions or even on possible defects of a product as established by blueprints and their alterations. In formulating the requests and in using the evidence, U.S. courts are asked for considerable adaptation to Convention procedures. But "accommodation of the different methods" of taking evidence is what the Preamble of the Hague Evidence Convention says international legal assistance is about. Such adaptation emanates from the legal obligation to implement the Convention and therefore has to be included into any assessment of what constitutes "best evidence" from the point of view of U.S. law.

Above all, substituting documentary evidence by depositions at the pretrial stage has stood the test of German-U.S. practice. The Permanent Bureau to the Hague Convention on Private International Law stated in its report on the operation of the Convention: "The decision of the Oberlandesgericht (Higher Regional Court) Munich of 27 November 1980 . . . illustrates that even where the requested state, as in case of the Federal Republic of Germany, has made an absolute reservation under Article 23, it may be possible to obtain information on documents which themselves could not be surrendered or produced, by way of the compulsory examination of third persons as witnesses concerning the contents of those documents." [14] In that case, the Bavarian Minister of Justice decided, on the one hand, to decline a request for

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[14] Hague Conference on Private International Law, Report on the Second Meeting of the Special Commission on the Operation on the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Prepared by the Permanent Bureau, July 1985.

the production of documents and, on the other hand, to grant a request for depositions. The decision of the Minister of Justice was confirmed on both counts by the Oberlandesgericht.[15] Counsel for the party seeking the evidence later reported "that the depositions could be taken only with respect to the material listed in the document request, even though the document request had been denied" and summarized his report by stating: "All things considered, the German depositions in the end worked out rather well." [16]

Requests for the production of documents at the trial stage will, unlike those at the pretrial stage, be entertained by Germany according to the general conditions set forth above regarding the deposition of witnesses. As a result, documents would have to be sufficiently specified to conform with Article 3 of the Convention. Yet a careful handling of depositions at the pretrial stage would enable one to be reasonably specific. No further adjustment of U.S. trial procedures seems required. Plaintiff would, as a result of pretrial depositions, have sufficient knowledge regarding the contents of the documents as to be able to decide on having them produced during trial. Such production of documents could, under Article 23 of the Convention and under the respective German declaration, be ordered well ahead of trial as long as such order would not have to be implemented before trial actually begins.

While it is true, therefore, that Germany would not execute a request for production of documents at the present stage, the unavailability of that particular means of evidence is offset by the availability of two other Con-

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[15] OLG München, Decisions of October 31, 1980 and of November 27, 1980, 9 VA 3/80 und 4/80, 20 International Legal Materials 1025, 1049 (1981).

[16] Charles Platto, Taking Evidence Abroad for Use in Civil Cases in the United States: A Practical Guide, 16 International Lawyer 575, at 584, 585 (1982).

vention procedures: extending depositions to the contents of the documents and postponing the production of documents to the trial stage. The Superior Court of New Jersey was right when it observed in Vincent v. Motobecane: "Moreover, if Vincent (scil. when using Convention procedures) is denied access to the actual documents themselves, it may still be able, even without them, to obtain the technical and commercial information it seeks." [17]

2. Inconclusiveness of the Convention as to its Relation to Domestic Procedures.

Having established that Convention procedures are indeed available for the purpose of taking evidence in the two instant cases, it may now be asked how the Convention rules on its relation to such domestic procedures as presently under review. Is the Convention exclusively applicable whenever its procedures are available? Does the Convention offer an option in addition to the availability of domestic procedures? Or does the Convention constitute the primary way of taking the evidence necessary in a particular lawsuit?

The Convention is on "the taking of evidence abroad." Its text does not seem to side with any of the above, nor any additional, alternatives. Under Article 27 of the Convention, contracting states are not prevented from "permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention." That clause should not be misread to relate to the internal law or practice of the requesting state. It merely states the obvious: The requested state may be more generous than provided for under the Convention and is free to grant assistance under Chapter I of the Convention or to permit the taking of evidence by diplomatic officers under Chapter II of the Convention in

[17] James Vincent et al. v. Ateliers de la Motobecane S.A., 475 A.2d 686, at 690 (N.J.Super.A.D. 1984).

greater breadth than the contracting parties were prepared to commit themselves to by treaty obligation.[18]

The parallel treaty, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965, states in its Article 1(1): "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." [19] In Anschütz, the court of appeals interpreted that clause to provide for the exclusiveness of the Service Convention in contrast to the Evidence Convention.[20] That is correct as regards serving documents abroad, but not as regards bringing about the same effect by domestic service, e.g. by publishing an announcement in the official journal to effectuate service against persons residing abroad. The German government, when submitting both Conventions to the Federal Diet for parliamentary consent, clearly stated that such other methods of bringing service to persons living abroad had not been ruled out.[21] To the question under review here, it is of no significance, therefore, that the Evidence Convention does not contain a provision similar to Article 1 (1) of the Service Convention.

The text of the Hague Evidence Convention not being just ambiguous but silent, there is no room for using imaginative techniques of interpretation. The Convention does not answer any of the above questions. It remains

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[18] For the same view cf. e.g. Philadelphia Gear Corp. v. American Pfauter Corp. et al., 100 F.R.D. 58 (E.D. Pa. 1983); Comment, the Hague Convention on the Taking of Evidence Abroad In Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad, 132 UPaLRev 1461, at 1476 (1984).

[19] 20 U.S.T. 361, T.I.A.S. No. 6638, Bundesgesetzblatt 1977 Teil II 1453.

[20] Anschütz, at 615.

[21] Bundesregierung, Denkschrift zu den Übereinkommen, Bundestags-Drucksache 8/217, 38, at 40-41 (1977).

inconclusive. Its relation to domestic procedures will have to be derived from a rule of law separate from the Convention itself. The respective rule of customary international law will be for the next section of this opinion to establish.

IV. Customary International Law: The Protection of State Sovereignty.

Amicus briefs and diplomatic notes accompanying litigation before municipal courts signalize issues of extraterritoriality affecting state sovereignty. In fact, it was such reactions of foreign governments that gave rise to a give and take between the states which developed patterns of statute practice eventually to grow into rules of customary international law protecting state sovereignty.

In Anschütz, the court of appeals was by no means unsensitive to the international dimension of the case. It invited the German government and the U.S. Department of Justice to state their views, and, in its opinion, it subscribed to the need of avoiding "any infringement upon German sovereignty." [22] The court, however, could not find an infringement unless the evidence were taken in Germany. Similarly, in Messerschmitt, the court first acknowledged Germany's legitimate concern, but was then satisfied to find the balance of comity considerations to be in favor of the U.S. since the order for the production of documents would not require "any governmental action in Germany," and as to the expert witnesses, comity principles were, in the court's view, not implicated at all.[23]

In the following, the discussion will focus first on establishing the rule of customary international law on the protection of state sovereignty when evidence is taken from abroad (Subsection 1). Thereafter that rule will be applied to the facts of the Anschütz and Messerschmitt cases (Subsection 2).

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[22] Anschütz, at 615.

[23] Messerschmitt, at 732-733.

1. Accommodating Conflicting Interests of Foreign States

Taking evidence from a foreign state, rather than in a foreign state, is just one instance of the general problem of extraterritorial jurisdiction: Respecting the physical integrity of foreign territory, but causing conduct in foreign territory by way of domestic measures. In the case of taking evidence it is the domestic courts that order such foreign conduct, to wit, making a witness travel to domestic territory or collect documents and take them to domestic territory for production there.

The international law on extraterritorial jurisdiction as it developed in the fields of antitrust law, security exchange control law, export control law, etc. could not precisely be called well settled. Some basic tenets, however, are no longer controversial:

(1) Causing extraterritorial effects is not generally prohibited. Matters for regulation are transterritorial in nature and could not be split up and apportioned to the exclusive jurisdiction of the respective states.

(2) Causing extraterritorial effects is not generally permitted either. A free-for-all of extraterritorial regulation would, by establishing conflicting demands, disorientate decision-making of individuals and create general chaos.

(3) Exercising extraterritorial jurisdiction is in conformity with international law if the foreign state where the extraterritorial effects are to occur is, neither generally nor in the particular case known to be objecting.

What is the law when the foreign state, as in the instant cases, does raise objections? The general principle of sovereign equality demands, and the overall record of state practice confirms: Conflicting interests of foreign states have to be accommodated, especially by adopt-

ing compromise solutions; if no compromise solution can be found, states are not permitted to take such measures as would cause greater harm to foreign interests than do good for domestic interests.

To what extent a state is obligated to defer to greater interests of foreign states may still be a matter of controversy. The first draft of the Restatement of Foreign Relations Law (Revised) was very vague in that respect when it stated in § 403 (3): ". . . Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in Subsection (2)." [24] Yet the latest draft, to be submitted for final approval at the Institute's Annual Meeting in May 1986, contains the following new text of § 403 (3): "(3) When more than one state has a reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by two or more states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction in light of all the relevant factors, including those set out in Subsection (2), and should defer to the other state if that state's interest is clearly greater." [25] In the opinion of this writer, the last part of the provision would have to read: ". . . each state has an obligation . . . to defer to the other state if that state's interest is greater." [26] There is, however, no need to elaborate on the evidence for that thesis here since the first part of the above rule, regard-

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[24] The American Law Institute, Restatement of the Law, Foreign Relations Law of the United States (Revised), Tentative Draft No. 2 (1981).

[25] The American Law Institute, Restatement of the Law, Foreign Relations Law of the United States (Revised), Final Draft, to be published shortly.

[26] Cf. Karl M. Meessen, Antitrust Jurisdiction Under Customary International Law, 78 AmJInt'lL 783 (1984); idem, Extraterritoriality of Export Control: A German Lawyer's View of the Pipeline Case, 27 German Yearbook of International Law 97 (1984).

ing the accommodation of interests of foreign states, suffices to deal with the instant cases at this stage as will be shown in Subsection 2 of this Section.

The international law obligation to accommodate interests of foreign states has, probably for the first time, been formulated in § 40 of the Second Restatement of Foreign Relations Law in 1965. There, in cases of concurrent jurisdiction of two or more states, each state was stated to be "required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states, . . ." [27] In the meantime, U.S. courts, partly relying on U.S. law principles of comity, have brought ample proof of both the existence and the practical operability of the rule.[28] The final decision in Timberlane of 1984 [29] confirmed the rule, and the 1984 decision of the Court of Appeals for the District of Columbia Circuit in Laker [30] is not to the contrary since the limitations to the application of comity mentioned there leave unaffected the obligation to accommodate such foreign interests as are not "fundamentally prejudicial to those of the domestic forum." [31]

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[27] The American Law Institute, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

[28] Cf. e.g. Restatement in the Courts, Cumulative Annual Pocket Part For Use In 1985-1986, Reporting All Cases Through June 1984 that cite Restatement of the Law, Second, Foreign Relations Law of the United States, at 61 et seq. (1985).

[29] Timberlane Lumber Co., et al., v. Bank of America N.T. & S.A. et al., 749 F.2d 1378 (9th Cir. 1984), cert. denied, 105 S.Ct. 3514 (1985).

[30] Laker Airways Limited v. Sabena, et al., 731 F.2d 909 (D.C. Cir. 1984).

[31] Laker v. Sabena (note 30), at 937; for a general evaluation of the Laker opinion cf. Meessen, Antitrust Jurisdiction (note 26), at 786 et seq., 801 et seq.

In the Restatement of Foreign Relations Law (Revised), the accommodation of foreign interests has been included into the broader principle of "reasonableness" which states as an international law obligation to evaluate i.a. "The likelihood of conflict with regulation by other states." [32] Even the Court of Appeals for the Fifth Circuit, as may be gathered from its reference to comits,[33] does not seem to be objecting to the existence of an obligation to accommodate foreign state interests. But, in cases on the taking of evidence "from, not in, a foreign state," the court seemed determined never to find any need for such accommodation since effects on foreign sovereignty were practically ignored. It is this application of the rule that was inadequate as will be demonstrated in the following subsection.

2. Applying the Rule on the Accommodation of Foreign Interests

The international law rule again is: In exercising jurisdiction, a state has to accommodate conflicting interests of foreign states, especially by adopting compromise solutions.

To the American reader, applying that rule will very much look like applying comity principles of U.S. law. Both rules are in fact interrelated: The state practice underlying the international law rule substantially draws from U.S. case law developed under comity considerations, and that case law may, as will be shown in the next Section, continue to be applied if kept short of an infringement of international law.

To apply the international law rule, it is suggested to start by assessing foreign, i.e. German, interests (Subsection 2 a), then to proceed to an assessment of U.S. interests (Subsection 2 b), and finally to discuss an ac-

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[32] The American Law Institute (note 28), § 403 (1) and (2) (h).

[33] See above notes 22 and 23.

commodation of the interests of the two states involved (Subsection 2 c).

a) German Interests

As has been mentioned at various instances, the German government intervened in Anschütz and lodged a formal diplomatic note on November 29, 1985. That attitude towards taking of evidence may be traced back to the German answer to a questionnaire distributed in 1968 to prepare the drafting of the Hague Evidence Convention: "Furthermore the hearing of a witness in a judicial proceeding constitutes an act of sovereignty which may only be performed by a judge or any other agent legally authorized." [34] The U.S. delegation that had taken part in the drafting of the Convention clearly understood the point made by the German government and other governments when it used the following formulation in its report: "In drafting the Convention, the doctrine of 'judicial sovereignty' had to be constantly borne in mind. Unlike the common-law practice which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers obtaining of evidence a matter primarily for the courts, with the parties in the subordinate position of assisting the judicial authorities." [35] The term "judicial sovereignty" precisely designates what the German government is concerned about. Those concerns will, however, have to be explained in greater detail.

In Messerschmitt, the court of appeals remarked that "American discovery procedures may indeed inconven-

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[34] Conference de la Haye de droit international prive, Actes et documents de la onzieme session, 7 au 26 octobre 1968, tome IV, Obtention des preuves a l'etranger, at 22 (1970)—author's translation from the French original.

[35] U.S. Delegation to the 11th session of the Hague Conference on Private International Law, Report of April 1969, 8 International Legal Materials 785, at 806 (1969).

ience the German civilian judicial system." [36] To many Germans who are involved as parties or witnesses in U.S. discovery proceedings, the situation is not just inconvenient, but frightening. The frightening aspect is not that they have to reveal the truth for the purposes of a specific claim brought before the court. They would have to do so under Convention procedures as well. The frightening aspect rather is that many matters would have to be revealed without ever being of any use for the ongoing litigation. German firms would not understand if their business operations in Germany, not just those in the U.S., were hampered for a considerable period of time by having to answer lengthy interrogatories, to disclose hundreds of files of documents and to give leave of absence to employees for depositions in the United States. As regards the production of documents, German defendants could not, unlike U.S. defendants, ease matters by allowing inspection to take place in Germany, since this would mean exercise of U.S. judicial authority within a foreign state, which is, if objected to by that state, clearly prohibited. In the case of a foreign witness, therefore, there is no way to control into whose hands the information disclosed might be passed on. Competitors might obtain valuable information. German witnesses are also concerned about the need to retain U.S. counsel for the purpose of preparing in Germany the taking of evidence in the United States and for the purpose of responding by requests for broad discovery against the plaintiff. German firms and individuals feel professional privileges to be undercut and business secrets to be jeopardized. The bargaining aspects of some of those campaigns for discovery and U.S. practice of paying contingency fees to lawyers cause additional resentment.

The German attitude should not be misinterpreted as in any way criticizing the U.S. judicial system as such.

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[36] Messerschmitt, at 732.

It only results from unfortunate experiences caused by the interplay of the two systems whenever U.S. style discovery became effective in Germany. The German position has to be seen in the context of German procedures on taking evidence and of their constitutional background.

Court control of civil litigation in Germany has aptly been described as "conference method." [37] As regards the taking of evidence, three different phases could, perhaps, be distinguished although it would depend on the complexity of the case to what extent these phases could overlap or coincide: [38]

(1) On the basis of two comprehensive pleadings, the one containing the complaint and the other one the defense, the judge will try to find out what the parties are aiming at and on what grounds, in his view, the claim and the defense could possibly be based. He will pay special

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[37] Benjamin Kaplan/Arthur T. von Mehren/Rudolf Schaefer, Phases of German Civil Procedure, 71 HarvLRev 1193, 1443, at 1471 (1958).

[38] For a comprehensive English language description, the author's preference for the German system left aside, cf. John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823 (1985); cf. also Rolf Bender/Christoph Strecker, Access to Justice in the Federal Republic of Germany, in: Mauro Cappelletti/Bryant Garth (eds.), Access to Justice, Volume I, Book II, at 551 et seq. (1978); Hartwig von Westerholt/Peter Lantz, Litigation in Civil Courts, in Bernd Rüster (ed.), Business Transactions in Germany, Volume I, Chapter 5, at 5-34 et seq (1983); Donald R. Shemansky, Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation, 17 International Lawyer 465 (1983); Peter Gottwald, Simplified Civil Procedure in West Germany, 31 AmJCompL 687 (1983); Axel Heck, Transnational Litigation: Federal Republic of Germany and the E.E.C., 18 International Lawyer 793 (1984); Hans Schima/Hans Hoyer, Ordinary Proceedings in First Instance: Central European Countries, in: International Encyclopedia of Comparative Law, Volume XVI, Chapter 6, p. 6-130 (1984).

attention to isolating the factual allegations necessary to support the various legal points and to finding out which of those facts have been admitted and which are still being contested by the other party and, therefore, have to be established through the taking of evidence. Even if a party is represented by counsel, the judge might find it necessary to suggest to supplement factual allegations and/or requests for taking evidence.

(2) The judge will then hear the parties, perhaps urge a settlement and decide about the taking of evidence as to those of the factual allegations that are both relevant and contested. The taking of evidence may be ordered by a formal ruling, by an informal letter to both parties or by a more or less casual observation made during the hearing. To some extent, judges have the authority to order the taking of evidence not requested by either party in order to get a more accurate account of the relevant facts.

(3) The actual taking of the evidence is carried out before court and under the direction of the judge. In particular, it will be the judge who extensively examines the witness and, only afterwards, allows for additional questions by counsel of each party. The judge then formulates a summarizing report of what the witness has said, always focusing on the relevant facts and those circumstances which throw light on the credibility of the witness. During the taking of evidence the judge makes sure that privileges of parties and third persons receive adequate protection even when no objections were raised to that effect.

Aiming at a rapid and correct conclusion of litigation is an objective Germany shares with the U.S. The

prominent role of the judge in controlling the taking of evidence, however, marks a notable contrast, not to other civil law countries, but to the U.S. Overcoming the laissez-faire liberalism of the 19th century, Germany gradually introduced welfare state notions into private litigation. The welfare aspect is that neither the parties nor third persons should suffer from poor presentation of their case often due to inadequate counseling which in turn may, but need not, result from a lack of financial resources. The judge, as both impartial and active director of the proceedings, has to redress any imbalances of advocatorial skills, and he has to take care that the final judgment be as close to objective truth as possible.[39]

Today, that attitude is firmly established as a matter of constitutional law. The principle of welfare state is a binding principle of German constitutional law as is, of course, the equal protection clause.[40] Both provisions have repeatedly been applied in constitutional reviews of decisions of last instance in civil litigation. Thus the Federal Constitutional Court vacated a judgment of an ordinary court on the ground that the court should have exempted the party from a formally binding term.[41] It also vacated a ruling on a compulsory auction, pointing out that the judge should have advised the applicant to

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[39] Wolfram Henckel, Vom Gerechtigkeitswert verfahrensrechtlicher Normen, passim (1966); Karl August Bettermann, Verfassungsrechtliche Grundlagen und Grundsätze des Prozesses, 94 Juristische Blätter, 57, at 63 (1972); Rudolf Wassermann, Der soziale Zivilprozess, Aufklärung im Zivilprozess, at 38 et seq. (1982); for a short English-language reference to the concept see Peter Gottwald (note 38), Rolf Bender/Christoph Strecker (note 38) and especially Langbein (note 38), at 831 and 843.

[40] Basic Law of May 23, 1949, Articles 20 (1) and 3 (1); an English translation is published in: Amos J. Peaslee, Constitutions of Nations, 3d ed., vol. III, at 357 et seq. (1968).

[41] Bundesverfassungsgericht, Ruling of April 29, 1980, 54 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 117, at 124-125.

withdraw the application for commercial reasons,[42] and in another case, that the judge himself should, in the absence of the party, have postponed the auction for the same reason.[43] In a case concerning social security procedures, the Federal Constitutional Court argued that the failure of the statute to provide for advocatorial assistance was compensated by the courts controlling by themselves the process of taking evidence.[44]

There is another interrelated point of constitutional law explaining the German emphasis on "judicial sovereignty": the principle of proportionality. Proportionality is among the most frequently applied rules of constitutional law. It derives from the "Rechtsstaatsprinzip," the German equivalent to the due process clause, and it requires measures that interfere with private rights to be strictly limited to situations in which interference is both unavoidable and justifiable in view of reaching certain legitimate objectives.[45] The objective in this context is to hear and to decide upon a private claim submitted to private litigation. Under the principle of proportionality, therefore, the rights of personal privacy, commercial property, and business secrets may not be interfered with unless such interference is necessary to protect other persons' rights in the course of civil

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[42] Bundesverfassungsgericht, Ruling of March 24, 1976, 42 BVerfGE 64, at 78-79.

[43] Bundesverfassungsgericht, Ruling of April 24, 1979, 51 BVerfGE 150, at 156 et seq.

[44] Bundesverfassungsgericht, Ruling of January 22, 1959, 9 BVerfGE 125, et seq.; cf. also Bundesverfassungsgericht, Ruling of July 25, 1979, 52 BVerfGE 131, at 144 et seq. and Bundesverfassungsgericht, Judgment of July 1, 1980, 54 BVerfGE 237, at 273.

[45] For a recent discussion, with further references to doctrine and court practice, see Klaus Vogel/Wolfgang Martens, Gefahrenabwehr, 9th ed., at 389 et seq. (1986).

litigation.[46] As seen from this angle, court control of taking evidence is again required, else the taking of evidence could be too broad and would turn into discovery unrelated to the particular claim. It has to be emphasized, however, that the evidence that is really necessary for bringing a plausible claim may in most circumstances be freely taken, of course under court control. The comparison of privileges under German law and under U.S. law is not at issue.[47] The real issue is that in Germany the judge has to protect individuals against unnecessary attempts of disclosure and to grant whatever absolute privileges may be applicable.

To sum up, no objections against the substance of the product liability suits having been raised, at present it is only Germany's "judicial sovereignty" that is at stake. Yet Germany's judicial sovereignty is affected to a considerable extent. German defendants, and deponents and expert witnesses living in Germany, are being exposed to procedures of taking evidence which are in conflict not only with the German law and practice of civil procedure, but also with basic constitutional notions, such as the welfare function of the judiciary and the maintenance of proportionality in civil litigation. Both opinions under review, it is submitted, suffer from a failure to understand the dignity of those interests forming part of German judicial sovereignty.

b) U.S. Interests

It naturally is within the interests of the U.S. to allow its courts to deal with any claims properly brought be-

[46] Karl Heinz Schwab/Peter Gottwald, Verfassung und Zivilprozess, at 67 (1984); proportionality being an undisputed guideline under German public law, there has not yet been any need for an extensive discussion of its application to civil procedure.

[47] As to this point, see Peter Schlosser, Internationale Rechtshilfe und rechtsstaatlicher Schutz von Beweispersonen, 94 Zeitschrift für Zivilprozessrecht, 369 passim (1981).

fore them in such a way as to be as close as possible to objective truth. In Anschütz, the court of appeals repeatedly stated that it saw no reason to confine discovery as against a defendant subject to its personal jurisdiction merely for the reason of the defendant's foreign nationality or of the foreign location of the evidence.[48] Similarly the court in Messerschmitt took note of the "American litigants' interest in promptly obtaining the documents and deposition testimony necessary to prepare for complex litigation in an American court . . ." [49]

From the U.S. point of view, administration of justice indeed does not protect either Anschütz or Messerschmitt against any taking of evidence just because of their foreign nationality or of the foreign location of the evidence. But whether such protection will be granted would have to be examined in view of the availability of alternative means to obtain the evidence necessary to establish the facts relevant for a disposition of the claims. As has been elaborated above,[50] Convention procedures give access to the necessary evidence located in Germany. To be sure, using the channels of the Hague Evidence Convention may seem more cumbersome to the American plaintiff. But that option cannot be ignored when it comes to an accommodation of interests as it will be explained in the following Subsection.

c) Accommodating German and U.S. Interests

In the instant cases, a compromise could be reached by proceeding in two different phases: If, in a first phase, Convention procedures were used, German interests in judicial sovereignty would be fully respected while U.S. interests in obtaining the necessary evidence would either be met as well, if the litigation is concluded, or would,

[48] Anschütz, at 609, 611 et seq.

[49] Messerschmitt, at 732.

[50] Supra at 11-18 of this opinion.

if no conclusion is reached, at most be suspended temporarily. U.S. courts could always, in a second phase, be asked to protect remaining U.S. interests by taking such measures as may then be necessary in order to have the evidence transferred from Germany into the U.S.

The court of appeals in Anschütz was quick in rejecting a second balancing under comity principles since it believed such balancing would always be in favor of the U.S. and would therefore constitute "the greatest insult to a civil law country's sovereignty." [51] The court's conclusion is, it is submitted, not warranted, since it rests on the wrong assumption that using the channels of Convention would lead to nowhere. Experience tells, however, that upon using the Convention procedures the situation is likely to be quite different from what it is now.

The whole issue might, for various reasons, have become moot by then. The depositions could have produced sufficient information to go to trial. Or plaintiff could be prepared to drop the claim or to settle. If plaintiff felt the need of continuing discovery in order to prepare trial, the issues would nevertheless have been clarified to some extent. Requests for further information under the Convention could be formulated more precisely. Above all, production of reasonably identifiable documents could be prepared for the trial stage.

In view of the broad spectrum of possible developments, going through a first phase of using Convention procedures does make sense even to the U.S. U.S. plaintiffs will just have to overcome their natural antipathy against using procedures unfamiliar to them. Their interest in obtaining the necessary evidence being granted, allowance for different procedures must be made if evidence is located abroad. Equal treatment of domestic

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[51] Anschütz, at 613.

and foreign evidence means to provide an equal chance in adequately reaching the overall objectives of civil litigation. It does not suggest undiscriminate application of the same rules to situations as different as those.

Furthermore, such "enlightened" interpretation of domestic interests [52] would also have to take into account the possibility of adverse reaction on the part of the foreign state in question. The U.S. might not mind U.S. defendants being exposed to a taking of evidence outside the channels of the Convention. Yet, there may be other reactions. The United Kingdom, for instance, has demonstrated that foreign defendants in U.S. lawsuits could, in the foreign state, be provided with a basis for reclaiming there whatever they were coerced to grant in the U.S.[53] Germany would certainly be most reluctant to engage in such retaliatory action. But it is not Germany alone that is involved in disputes regarding domestic taking of evidence from abroad. It may, therefore, be worthwhile to remember that the balance of power as it is presenting itself in the instant cases could well be changed in favor of the foreign party since, in view of the worldwide spread of commercial property, enforcement would raise no serious problems.[54]

To sum up, in both Anschütz and Messerschmitt, German and U.S. interests are to be reconciled by going through the Convention channels first and, if at all necessary, by coming back to the question later whether and to what extent U.S. courts should, by themselves, order the taking of evidence from Germany.

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[52] Cf. Meessen, Antitrust Jurisdiction (note 26), at 798 et seq.

[53] For a recent survey of cf. Gary B. Born, Recent British Responses to the Extraterritorial Application of United States Law: The Midland Bank Decision and Retaliatory Legislation Involving Unitary Taxation, 26 VirgJInt'lL 91 (1985/1986).

[54] For the related point of U.S. enforcement of U.S. orders see above at 6.

V. Conflict Avoidance Under Comity Principles

Regarding state jurisdiction, international law only provides for a minimum standard which every state has to respect. Normally, states keep clear of any violation of that minimum standard by applying national rules of conflict laws which are tailored to the needs of each particular state. Comity has always been the primary instrument of U.S. law to avoid international conflicts likely to generate violations of international law. It would, therefore, be by applying comity principles that the U.S. could avoid violating the above rule of international law on the accommodation of interests of foreign states.

The U.S. principles of comity seem to be sufficiently open to permit U.S. Courts to assess properly the weight of German judicial sovereignty and to reassess U.S. interests in view of the availability of Convention procedures in the instant cases. This writer, therefore, is confident that a realistic application of comity principles will make unnecessary any direct reference to international law. If, however, applying comity principles does not first suggest exhausting Convention procedures, such result would have to be reached by applying international law as the law of the land, lest the United States be exposed to international responsibility vis-a-vis the Federal Republic of Germany.

Chicago, Illinois, March 31, 1986

Karl M. Meessen

Nos. 85-98, 85-99

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANSCHUETZ & Co., GmbH,
Petitioner,

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,
Respondents.

MESSERSCHMITT BOLKOW BLOHM, GmbH,
Petitioner,

v.

WALKER, *et al.*
Respondents.

On Petitions for Writs of Certiorari to United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF OF THE AMICUS CURIAE FEDERAL REPUBLIC OF GERMANY

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IN THE

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No. 85-98

ANSCHUETZ & CO., GmbH,

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On Petitions For Writs of Certiorari to United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF OF THE AMICUS CURIAE FEDERAL REPUBLIC OF GERMANY

Pursuant to Rule 22.6 of the Rules of this Court, which the amicus curiae deems to be the most nearly applicable, the Federal Republic of Germany herewith respectfully files this brief for the purpose of calling to the Court's attention

the diplomatic note presented by the Federal Republic of Germany to the United States Department of State on April 8, 1986, which is attached hereto. This note underscores the strong interest of the Federal Republic of Germany in obtaining review by this Court of the important issues raised in these cases.

In *Anschuetz* the Court of Appeals for the Fifth Circuit held that "the Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules."

The Solicitor General admits that this holding, which he refers to as a mere "statement", is "plainly overbroad" (Brief of Solicitor General, at 17 n.21), that the comity analysis of the *Anschuetz* court is "cursory" (Br. at 13) and that the decision contains "some troublesome language" (Br. at 6), yet he supports the decision for its supposed correct result. However, it is these flawed aspects of *Anschuetz* which other courts have subsequently relied on when ruling on the applicability of the Convention.[1]

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[1] *See, e.g., In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 124-25 (8th Cir. 1986) (relying on *Anschuetz* and holding that when a district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may be physically located within the territory of a foreign signatory to the Covention); *Lowrence v. Weinig*, 107 F.R.D. 386, 389 (W.D. Tenn. 1985) (holding that no comity analysis is necessary when production of documents located abroad is to occur in this country); *see also In re Ljusne Katting*, A.B., No. 85- 2573 (5th Cir. 1985) (citing with approval *Anschuetz* "overbroad" statement, but holding that the Convention must be used when deposing foreign nationals in their home country or inspecting premises in a foreign country).

The Federal Republic of Germany is concerned that the trend toward improved judicial assistance between the United States and the Federal Republic of Germany, reflected by the ratification of the Hague Evidence Convention, may have been halted or even reversed by this decision. The Court should therefore grant certiorari to narrow *Anschuetz* and to enuciate the elements of a proper comity analysis to be used in connection with the Convention.

Respectfully submitted,

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APPENDIX

APPENDIX A

Embassy of the
Federal Republic of Germany
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The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to make the following comments on the amicus curiae brief for the United States in the matters of Anschuetz & Co. GmbH, petitioner, v. Mississippi River Bridge Authority, et al, and Messerschmitt-Boelkow-Blohm, GmbH, petitioner, v. Virginia Walker, et al.

The Embassy has taken note, with surprise, of the US Government's recommendation to the Supreme Court not to grant certiorari in a matter on which the Federal Republic of Germany has, throughout the years, continously expressed its grave concern.

In its brief, the US Government seriously underestimates the German Federal Government's resolve concerning German judicial sovereignty which is embedded in the German constitution, and, therefore, cannot be waived by the government. Whether evidence is to be taken on German territory or taken from German territory to another country, the German parties or witnesses concerned have a constitutional right that a German judge supervise the process of taking evidence lest certain fundamental rules of the German law be violated.

The respect of another country's judicial sovereignty is the very principle of international law upon which all international treaties on judicial assistance are based and which the Federal Republic of Germany hoped to see observed by the United States when becoming a party to the Hague Evidence Convention.

Furthermore, the US Government's brief fails to take account of the fact that evidence taken in the Federal Republic of Germany under the procedure of the Hague Evidence Convention can be utilized in American courts.

Verbatim transcripts of witnesses' testimony can be taken and American parties may be present and ask questions at court hearings. Although the taking of documentary evidence is not yet possible in the Federal Republic of Germany during the pre-trial stage, witnesses may be questioned by German courts on the contents of documents located in the Federal Republic of Germany to the extent such documents are relevant to the litigation. The practice of substituting the testimony of witnesses for pre-trial production of documents has in the past been used by US parties seeking evidence in the Federal Republic of Germany.

Thus, through exhausting convention procedure, infringement upon German sovereignty can be avoided without impairing the US interest in granting US plaintiffs such access to evidence as they may need to obtain proof for their claims against German defendants.

The Federal Republic of Germany continues to support petitioners' request in Anschuetz that the US Supreme Court grant certiorari and render a decision taking into account the respect of other countries' sovereignty which is the fundamental principle on which international law is based.

Washington, D.C., April 8, 1986

Supreme Court, U.S.
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MAR 24 1986
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Nos. 85-98 and 85-99

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v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, ET AL.

MESSERSCHMITT BOLKOW BLOHM, GmbH., PETITIONER

v.

VIRGINIA WALKER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a federal district court, adjudicating a private civil suit involving a foreign national subject to the court's jurisdiction, must employ the procedures set forth in the Hague Evidence Convention to discover evidence within the possession or control of the foreign national but located abroad.

2. Whether, if the Hague Evidence Convention is not the exclusive method for obtaining such evidence, principles of international comity nevertheless require the use of the Convention in the present cases.



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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-98

ANSCHUETZ & CO., GmbH., PETITIONER

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, ET AL.

No. 85-99

MESSERSCHMITT BOLKOW BLOHM, GmbH., PETITIONER

v.

VIRGINIA WALKER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioners are corporations based in the Federal Republic of Germany (Germany) that are presently defending unrelated private tort suits in United States courts. They seek review of the court of appeals' refusal to vacate separate federal court discovery orders, entered in accordance with the Federal Rules of Civil Procedure, that require production in this country of documents and deponents located in Germany. Neither petitioner presently contests that it is subject to the jurisdiction of the United States courts. Each contends, however, that the relevant discovery order is invalid. They maintain that the Hague

Evidence Convention[1] provides the exclusive avenue for private litigants in United States courts to obtain discovery of evidence presently located in Germany. In addition, they argue that even if the Hague Evidence Convention is not the sole method for obtaining that evidence, principles of international comity compel its use in the present cases. In their view, a "letter of request" from the federal district court to German judicial authorities, executed in conformance with the Convention's provisions, is the appropriate method for obtaining evidence located abroad.[2]

1. The petitioner in No. 85-98, Anschuetz & Co., GmbH., is a third-party defendant in an admiralty tort suit arising from a 1979 collision in the Port of New Orleans. In that incident, a Spanish vessel, the M/V Pola de Lena, chartered by Gijonesa de Navegacion S.A. (Gijonesa), collided with the Gretna Ferry Landing and two ferry boats owned by the Mississippi River Bridge Authority. The Bridge Authority and others sued Gijonesa for damages. Gijonesa filed a third-party complaint against Anschuetz, which manufactured the steering device on the Pola de Lena. The third-party complaint alleged that failure of the steering system caused the collision. 85-98 Pet. App. 3a.

Gijonesa served Anschuetz with extensive interrogatories, requests for production of documents, and notices of depositions to take place in Germany. Anschuetz moved for a protective order on the ground that the discovery request was overbroad. The magistrate denied the protective order and directed Anschuetz to comply with most of the discovery demands (85-98 Pet. App. 4a-5a). In early April 1984, some of the deponents—Anschuetz employees subject to deposition pursuant to Fed. R. Civ. P. 30(b)(6)—apparently were examined in Germany (see 85-98 Pet. App. 5a, 35a, 40a).

Soon thereafter, Anschuetz moved for a protective order to prevent further depositions scheduled to take place in Germany on May 2, 1984. It asserted, apparently for the first time, that

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[1] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555 *et seq.* (entered into force between the United States and the Federal Republic of Germany on June 26, 1979) [hereinafter cited as Hague Evidence Convention].

[2] See Hague Evidence Convention, arts. 1-14, 23 U.S.T. 2557-2564 (describing the procedures for utilizing a letter of request).

the discovery should be obtained through the procedures of the Hague Evidence Convention. The Magistrate denied that motion (85-98 Pet. App. 5a). Anschuetz appealed to the district court, which affirmed the magistrate's ruling (*id.* at 28a-38a).

Anschuetz requested a writ of mandamus from the court of appeals to prevent the taking of depositions and production of documents in Germany. The court of appeals stayed the district court discovery proceedings and requested the views of Germany and the United States concerning the applicability of the Hague Evidence Convention in the present case (85-98 Pet. App. 5a). Germany filed a brief amicus curiae stating that the district court's discovery order, requiring the taking of depositions and the production of documents in Germany, "would be a violation of German sovereignty unless the order is transmitted and executed by the method of Letter of Request under the [Hague] Evidence Convention." Germany Amicus Br. 8, *In re Anschuetz & Co., GmbH,* No. 84-3286 (5th Cir.).

The United States filed a brief amicus curiae stating that the Hague Evidence Convention is not the exclusive means for obtaining evidence located in foreign countries. U.S. Amicus Br. 7, *In re Anschuetz & Co., GmbH*, No. 84-3286 (5th Cir.). The brief observed, however, that the conduct of depositions on German soil would be offensive to German sovereignty and could not be undertaken without resort to the Convention (*id.* at 9-10). The United States' brief also stated that, given Germany's sovereignty-based objections to the production of documents located in Germany, the district court should be required to reconsider its order, applying a careful comity analysis (*id.* at 7).

The court of appeals issued a lengthy opinion denying the petition for a writ of mandamus (85-98 Pet. App. 1a-27a). The court concluded that the Convention does not provide the exclusive means for obtaining evidence located in member countries (*id.* at 8a-11a, 24a). It ruled that a federal district court possessed of appropriate jurisdiction retains the power to order discovery from foreign nationals in accordance with the Federal Rules of Civil Procedure (*id.* at 23a).

The court of appeals concluded, however, that "in the realm of international discovery we believe the exercise of judicial power should be tempered by a healthy respect for the principles of comity" (85-98 Pet. App. 23a). It acknowledged Germany's objections to the discovery order, but nevertheless stated (*id.* at 26a):

> We hold that the Hague Convention is to be employed with the involuntary deposition of a party conducted in a foreign country, and with the production of documents or other evidence gathered from persons or entities in the foreign country who are not subject to the court's *in personam* jurisdiction. The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules.

Although the court of appeals refused to issue a writ of mandamus, it directed the district court to reconsider its discovery orders "in the light of the principles expressed in this opinion" (*id.* at 27a). In particular, the court of appeals observed that the district court could "order the production of documents and the examination of witnesses to occur in the United States to avoid any infringement upon German sovereignty" (*ibid.*).

2. The petitioner in No. 85-99, Messerschmitt Bolkow Blohm, GmbH., is a co-defendant in a wrongful death action arising from a 1982 helicopter crash near McKinney, Texas (85-99 Pet. App. 1a). In the course of discovery, the plaintiffs requested that Messerschmitt produce documents located in Germany. Messerschmitt objected, maintaining that production of those documents through means other than the Hague Evidence Convention would violate Germany's sovereignty (85-99 Pet. App. 2a). The magistrate ordered production of the evidence (*id.* at 13a-15a), concluding that resort to the Hague Evidence Convention "would be a futile gesture" (*id.* at 14a). The district court affirmed the magistrate's order (*id.* at 9a-12a).

Messerschmitt then petitioned the court of appeals for a writ of mandamus to vacate the discovery order.[3] That court, turning to its recent decision in *Anschuetz* for guidance, denied the petition (85-99 Pet. App. 1a-8a). It concluded that, under *Anschuetz*, "the Federal Rules of Civil Procedure, not the Hague Convention, normally govern the discovery of documents from foreign parties subject to the jurisdiction of a United States court, even though those documents are physically located in the territory of a foreign signatory of the Hague Convention" (*id.* at 3a).

The court of appeals observed, however, that *Anschuetz* required a court to "consider whether, as a matter of international comity, the parties should be required to proceed under the Hague Convention before discovery is compelled under the Federal Rules of Civil Procedure" (85-99 Pet. App. 3a-4a, (footnote omitted)). Weighing "Germany's interest in maintaining control over its judicial system against the American interest in obtaining full pretrial discovery of information relevant to pending litigation in the United States" (*id.* at 4a), the court concluded that the discovery order was proper. It stated (*id.* at 5a):

> The district court's order does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany. It requires only that a party admittedly subject to the personal jurisdiction of a United States court produce documents in the United States. The order for production of documents, therefore, appears to balance appropriately the considerations involved.

"Finding nothing in the district court orders that transgresses *Anschuetz*" (*id.* at 8a), the court of appeals denied the mandamus petition.

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[3] Messerschmitt also sought review of a district court order permitting deposition of Messerschmitt's expert witnesses (see 85-99 Pet. App. 2a). Messerschmitt indicates that that issue has since become moot (85-99 Pet. 4 n.4).

DISCUSSION

These cases present recurring questions concerning the use of the Hague Evidence Convention to obtain foreign evidence for use in private suits. We agree with petitioners that these questions are important. However, we believe that the court of appeals' decisions, while containing some troublesome language, are essentially correct. Furthermore, the decisions are in substantial conformity with a growing body of law addressing application of the Hague Evidence Convention. Under these circumstances, further review by this Court is unnecessary.

1. The Hague Evidence Convention provides methods for litigants involved in civil and commercial transnational disputes to obtain evidence from abroad. It is intended to help bridge the significant procedural obstacles encountered when litigants seek evidence located in a foreign country having a different legal system.[4] The Convention is based on the principle that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending." S. Exec. A, 92d Cong., 2d Sess. 11 (1972). See *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law,* 8 Int'l Legal Materials 785, 806 (1969).

The gathering of evidence in a foreign country raises a number of problems. For example, the evidentiary procedures of most civil law countries, including Germany, provide litigants with much less freedom in the collection of evidence for use in foreign litigation than do those of the United States and other common law countries.[5] In addition, countries that view the taking of evidence as a judicial function generally maintain

[4] See S. Exec. A, 92d Cong., 2d Sess. VI (1972); S. Exec. Rep. 92-25, 92d Cong., 2d Sess. 1 (1972); *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law,* 8 Int'l Legal Materials 785, 806 (1969).

[5] See, *e.g.*, Langbein, *The German Advantage in Civil Procedure,* 52 U. Chi. L. Rev. 823 (1985); Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation,* 17 Int'l Law. 465, 466-469 (1983); Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters,* 18 Int'l & Comp. L.Q. 646, 647 (1969). See generally Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure* (pts. 1 & 2), 71 Harv. L. Rev. 1193, 1443 (1958).

that gathering evidence within their territory, without their participation or consent, threatens their sovereignty.[6] Moreover, evidence acquired under the procedures of a country where the evidence is located may be supplied in a form that is unusable where the action is pending. See S. Exec. A, *supra,* at VI; S. Exec. Rep. 92-25, 92d Cong., 2d Sess. (1972). The Convention addresses these concerns by permitting "greater flexibility in the means available for obtaining evidence abroad" (*id.* at 4 (statement of Deputy Legal Adviser Salans)).

The Hague Evidence Convention provides three alternative methods for conducting evidence-taking proceedings abroad. Under the first method, a litigant may request the court where the action is pending to transmit a "Letter of Request" to the "Central Authority" in the country where the evidence is located. See arts. 1-2, 23 U.S.T. 2557-2558. The Central Authority, selected by the foreign government, then transmits the request to the appropriate foreign court, which conducts the evidentiary proceeding. See arts. 5-13, 23 U.S.T. 2560-2563. Upon request, the foreign court will conduct the evidentiary proceeding under procedures specified by the requesting court, unless those procedures are incompatible with internal law or impracticable. See art. 9, 23 U.S.T. 2561. Under the second method, the litigant may request that a diplomatic or consular officer of the country where the action is pending take evidence in the foreign country to which he is accredited. See arts. 15-16, 23 U.S.T. 2564-2565. Under the third method, the litigant may request that a specially appointed commissioner take evidence in the foreign country. Art. 17, 23 U.S.T. 2565. The three methods are similar to those identified by Fed. R. Civ. P. 28(b).

The letter of request generally is the most useful of the three mechanisms specified by the Convention. The other two methods apply only to noncompulsory evidentiary proceedings and are subject to other substantial limitations.[7] Petitioners urge that discovery in the present cases should be conducted pursuant to letters of request.

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[6] See Edwards, *supra,* 18 Int'l & Comp. L. Q. at 618; *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law, supra,* 8 Int'l Legal Materials at 806.

[7] In particular, a party to the Evidence Convention is expressly permitted to reserve the right not to allow the taking of evidence before a diplomat or con-

2. The United States adheres to its previously expressed view that the Hague Evidence Convention does not specify the exclusive means for litigants in United States courts to obtain discovery of evidence located in a foreign country that is a party to the Convention. See Brief for the United States as Amicus Curiae at 6-9, *Club Mediterranee, S.A.* v. *Dorin,* appeal dismissed and cert. denied, No. 83-461 (Oct. 15, 1984). An American court has the power to demand the production of evidence in the United States from foreign nationals who are subject to the court's personal jurisdiction. Nevertheless, as we have also discussed previously (*id.* at 9-13), the exercise of that power is subject to principles of international comity. American courts should utilize the procedures established by the Hague Evidence Convention in appropriate cases to avoid unnecessary international friction resulting from American procedures for pretrial discovery.

a. American courts may exercise jurisdiction over a foreign party if the party's contacts with the forum are sufficient "to make it reasonable and just" for the American forum to adjudicate the dispute. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952). American courts, of course, apply their own procedural rules to adjudicate these claims. Prior to the formulation of the Hague Evidence Convention, there was no dispute that federal courts could apply the Federal Rules of Civil Procedure to obtain discovery from foreign litigants of evidence located abroad. See Smit, *International Aspects of Federal Civil Procedure,* 61 Colum. L. Rev. 1031, 1053-1054 (1961). Furthermore, the courts recognized that they had the power to compel discovery of evidence located in a foreign country from parties subject to their jurisdiction. See, *e.g.*, *ibid.; United States* v. *First National City Bank,* 396 F.2d 897, 900-901 (2d Cir. 1968).[8]

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sular officer, or before a commissioner. See arts. 33, 35, 23 U.S.T. 2571, 2572. Germany has made such a reservation. However, pursuant to an exchange of diplomatic notes between the United States and Germany, non-compulsory depositions may be conducted before United States consular officials. See Brief for the United States as Amicus Curiae at 7-9, *Volkswagenwerk A.G.* v. *Falzon,* appeal dismissed, 465 U.S. 1014 (1984).

[8] Congress shared that understanding, even in the case of the Tax Court. For example, since 1954, the Internal Revenue Code has expressly authorized the Tax Court to order foreign corporations that petition for

There is nothing in the language of the Hague Evidence Convention displacing these principles and requiring exclusive recourse to the evidence gathering procedures of the Convention. The Convention does not state that it is the sole avenue for obtaining foreign evidence. Indeed, its provisions, read in light of similar international agreements, imply otherwise. For example, the Convention provides that "[i]n civil or commercial matters a judicial authority of a Contracting State *may*, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act" (art. 1, 23 U.S.T. 2557 (emphasis added)). This language stands in marked contrast to that of the Hague Service Convention,[9] which was concluded several years earlier and provides that "[t]he present Convention *shall apply in all cases,* in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad" (art. 1, 20 U.S.T. 362 (emphasis added)).

An examination of the treaty history reveals no intention among the negotiators for the United States, the Department of State, or Congress to prohibit the accepted practice of conducting extraterritorial discovery pursuant to federal and state rules.[10] To the contrary, the Senate Report stated that the Convention, first proposed by the United States, was intended to improve international judicial assistance by promoting letters of request as "a principal means of obtaining evidence abroad."

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refunds to produce documents, "wherever" located, that the Tax Court "may deem relevant to the proceedings and which are in the possession, custody or control of the petitioner, or of any person directly or indirectly under his control or having control over him or subject to the same common control." 26 U.S.C. 7456(b).

[9] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361 *et seq.* (entered into force for the United States on Feb. 10, 1969).

[10] See S. Exec. A, *supra*; S. Exec. Rep. 92-25, *supra; Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law, supra*, 8 Int'l Legal Materials at 804-820. See also Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention,* 37 U. Miami L. Rev. 733, 760 (1983) ("The author knows of no evidence that the American negotiators, the Department of State, or the Congress intended to prohibit this practice entirely.").

See S. Exec. Rep. 92-25, *supra,* at 1; see also *id.* at 3 (statement of Deputy Legal Adviser Salans). The Senate Report also noted the statement by Philip Amram, United States representative and rapporteur at the Hague Conference, that the Convention " 'makes no major changes in United States procedure and requires no major changes in United States legislation or rules' " (*id.* at 5 (citation omitted)).[11]

Moreover, the practical consequences of treating the Hague Evidence Convention as exclusive render that interpretation implausible. The Convention gives foreign judicial authorities substantial latitude in determining what evidence shall be transmitted to a requesting court. See, *e.g.*, arts. 9-12, 23 U.S.T. 2561-2563; see also *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 788-790 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981). In particular, member countries may elect to refuse letters of request "issued for the purpose of obtaining pre-trial discovery of documents" (art. 23, 23 U.S.T. 2568). Plainly, if the Convention provided the sole method for obtaining evidence from abroad, then foreign authorities could become the final arbiters of discovery disputes in American proceedings. American judges would lose supervisory control over discovery in pending cases and litigants might find it impossible to obtain necessary discovery abroad.[12] The United States, in proposing

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[11] Petitioners suggest that "it is difficult to see why countries such as Germany agreed to compel their citizens to provide evidence to United States courts if it was not in exchange for some limitations on the methods or scope of United States discovery from abroad." 85-98 Pet. 16 (footnote omitted); 85-99 Pet. 14-15 (footnote omitted). It is true that the United States had already provided foreign countries with broad evidence gathering opportunities prior to the Convention's entry into force. See 28 U.S.C. 1781-1782. However, Germany has received additional tangible benefits from the Convention despite its non-exclusive operation. First, the Convention provides an evidence gathering procedure that American courts may use in appropriate cases to prevent international friction. The availability of this optional method reduces the likelihood that United States courts will need to issue discovery requests that Germany might find objectionable. In addition, Germany enjoys the benefits of participation in a multilaterial convention that presumably enhances its evidence gathering opportunities in countries other than the United States.

[12] Petitioners suggest that American courts can cure this problem by "excluding evidence when the opposing party cannot test its probative value through examination of underlying and related evidence located abroad" or by

and ratifying the Convention, certainly did not intend these results.[13] The Convention cannot reasonably be construed as displacing the authority of United States courts to employ traditional discovery devices provided by federal and state court rules.

b. Although the Hague Evidence Convention is not exclusive, it nevertheless remains a valuable and workable mechanism for obtaining evidence abroad. American courts should give serious consideration to its use when they encounter foreign government objections to use of American discovery procedures. Furthermore, courts should refrain, when feasible, from ordering a party to perform acts that would violate the laws or clearly articulated policies of a foreign government. See, *e.g., Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.,* 105 F.R.D. 16, 28-29 (S.D.N.Y. 1984). The Convention provides a mechanism that, in appropriate cases, can reduce such conflicts.

Principles of international comity should guide a court's determination whether the Hague Evidence Convention should be employed in any particular situation. This Court has described the concept of comity as follows:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

"drawing adverse inferences from a party's failure to produce voluntarily evidence located abroad" (85-98 Pet. 17; 85-99 Pet. 15). However, these remedies are of little help to a plaintiff who needs evidence from abroad to develop and establish his case in chief.

[13] See Oxman, *supra,* 37 U. Miami L. Rev. at 760 ("Absent an express provision in the treaty that a longstanding practice valued by at least some members of the American bar was being abolished * * * it is unreasonable to conclude that the convention implies such a prohibition.").

Hilton v. *Guyot,* 159 U.S. 113, 163-164 (1895).[14]

The comity inquiry depends on the circumstances of each individual case. However, the Restatement (Second) of Foreign Relations Law of the United States § 40 (1965), sets forth some of the relevant considerations. A court should examine the competing interests of the United States and the foreign country, the hardships imposed by the discovery request, what activities are required in the territory of the foreign country, the nationality of the parties, and the extent to which enforcement of the discovery request can be expected to produce the requested evidence. See, *e.g., Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.,* 105 F.R.D. at 29-32. The court should also examine whether the Convention will provide effective discovery, considering such factors as the likelihood that the evidence can be obtained through Convention mechanisms and the expense, delay and other burdens that might result from their use.

In our opinion, the comity inquiry must remain flexible. The Convention has been ratified by numerous countries[15] and may be applied in a broad range of civil and commercial disputes. The courts therefore must have adequate discretion to consider the wide variety of factors that might be relevant in any particular instance.

3. Petitioners contend that the court of appeals erred in refusing to require application of the Hague Evidence Convention in the present cases, arguing that the Convention was meant to be exclusive and that the requested production of documents and deponents in the United States violates Germany's sovereignty (85-98 Pet. 14-21; 85-99 Pet. 13-19). We believe that the court of

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[14] See, *e.g., Laker Airways, Ltd.* v. *Sabena, Belgian World Airlines,* 731 F.2d 909, 937 (D.C. Cir. 1984); *United States* v. *First National Bank,* 699 F.2d 341, 345-347 (7th Cir. 1983); *United States* v. *Vetco, Inc.,* 691 F.2d 1281, 1288-1291 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *United States* v. *First National City Bank,* 396 F.2d at 901-905. Cf. *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958).

[15] The Convention is operative in Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, and the United Kingdom.

appeals' resolution of the discovery disputes is essentially correct and requires no further review.

We have already addressed the first question—whether the Hague Evidence Convention is exclusive—in our general discussion of the Convention (pages 8-11, *supra*). In our view, there is no serious dispute that the Hague Evidence Convention provides a non-exclusive mechanism for obtaining evidence from member countries. United States courts are virtually unanimous in concluding that the Convention is not exclusive.[16] As discussed above, that conclusion is supported by the language of the Convention, the events surrounding its formulation, and American judicial practices. The resolution of the issue in the present cases does not conflict with any decision of this Court, another court of appeals, or a state court of last resort. Accordingly, there is no need for further review of that question.

The second question—whether principles of comity require recourse to the Hague Evidence Convention in the present cases—is more difficult. In our view, the court of appeals was ultimately correct in holding that the district court, in both instances, could utilize the Federal Rules of Civil Procedure to require production of documents and party deponents in this country. The court of appeals acknowledged that its analysis "should be tempered by a healthy respect for the principles of comity" (85-98 Pet. App. 23a; see 85-99 Pet. App. 3a-4a). We believe that while the court's comity discussion was rather cursory, its decisions reveal adequate grounds in these cases for choosing to conduct discovery through the traditional methods

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[16] See, *e.g.*, *Lowrance* v. *Weinig*, 107 F.R.D. 386, 388-389 (W.D. Tenn. 1985); *Work* v. *Bier*, 106 F.R.D. 45, 52-53 (D.D.C. 1985); *Slauenwhite* v. *Bekum Maschinenfabriken, GmbH*, 104 F.R.D. 616, 618-619 (D. Mass. 1985); *Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.*, 105 F.R.D. 16, 27-28 (S.D.N.Y. 1984); *Laker Airways, Ltd.* v. *Pan American World Airways*, 103 F.R.D. 42, 48-50 (D.D.C. 1984); *Cooper Industries, Inc.* v. *British Aerospace, Inc.*, 102 F.R.D. 918, 919-920 (S.D.N.Y. 1984); *Graco, Inc.* v. *Kremlin, Inc.*, 101 F.R.D. 503, 519-524 (N.D. Ill. 1984); *Pierburg GmbH & Co. KG* v. *Superior Court*, 137 Cal. App. 3d 238, 243-244, 186 Cal. Rptr. 876, 879-880 (1982); *Gebr. Eickhoff Maschinenfabrik Und Eisengieberei mbH* v. *Starcher*, 328 S.E.2d 492, 497 (W. Va. 1985). Petitioners cite no reported decisions urging a contrary conclusion. See 85-98 Pet. 14-15 & n.29; 85-99 Pet. 13-14 & n.28.

prescribed by the Federal Rules of Civil Procedure rather than resorting to the Hague Evidence Convention. The court's decisions are consistent with the emerging case law addressing application of the Hague Evidence Convention. Further review of these decisions therefore appears unnecessary.

Petitioners contend that international comity requires that United States courts first resort to the Hague Evidence Convention before pursuing alternative methods, available under the Federal Rules of Civil Procedure, to secure evidence located in Germany. They submit that this "first-use" requirement is necessary because German sovereignty is violated if "information held in the foreign sovereign's territory by nationals of that sovereign is subject to disclosure by orders framed according to the dictates of an alien jurisprudence" (85-98 Pet. 19; 85-99 Pet. 17-18). Germany agrees (Amicus Br. 6-7), stating that "[o]nly its courts are empowered to compel persons under their jurisdiction to comply with orders of a foreign court requiring the gathering of evidence in the Federal Republic of Germany and its removal to the United States" (*id.* at 7).

We depart at the outset from the broad proposition that principles of international comity obligate American courts to seek first use of the Hague Evidence Convention in *every* instance where litigants seek discovery abroad. Instead, the demands of international comity require only that American courts give respectful consideration to claims of foreign "judicial sovereignty" in light of the precise nature of the foreign interests and the circumstances of the particular case. See *Hilton* v. *Guyot,* 159 U.S. at 164-165. "Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain." *Laker Airways, Ltd.* v. *Sabena, Belgian World Airlines,* 731 F.2d 909, 937 (D.C. Cir. 1984) (footnote omitted). "Mechanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case." *United States* v. *First National City Bank,* 396 F.2d at 901.

Germany's sovereignty interest in these cases appears relatively limited. Unlike the situation in *Volkswagenwerk A.G.* v. *Falzon,* appeal dismissed, 465 U.S. 1014 (1984), these cases do

not involve discovery on Germany territory. The orders will not require "any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany" (85-99 Pet. App. 5a).[17] Thus, the challenged discovery will not encroach upon Germany's exclusive authority to conduct judicial activities within its borders.

Furthermore, the discovery orders apparently do not violate any specific "content-based" restrictions upon foreign disclosure of information. For example, petitioners have not claimed that the discovery orders require divulgence of information that Germany treats as confidential under its internal laws. Thus, the discovery in these cases is fundamentally different from production of business secrets or confidential communications that receive substantive protection from disclosure.

Additionally, petitioners do not rely upon a so-called "blocking statute" prohibiting disclosure of information to foreign tribunals. Compare *Club Mediterranee, S.A.* v. *Dorin,* appeal dismissed and cert. denied, No. 83-461 (Oct. 15, 1984). While principles of comity do not require American courts to give conclusive weight to a foreign statute that simply expresses hostility to American discovery procedures, (see *Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.,* 105 F.R.D. at 30), an American court might give some consideration to the existence of such a statute as a measure of the foreign nation's depth of resolve concerning its "judicial sovereignty."[18]

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[17] The court of appeals, sensitive to German territorial sovereignty, specifically observed that the Convention should be employed in the case of an "involuntary deposition of a party conducted in a foreign country" (85-98 Pet. App. 26a; see 85-99 Pet. App. 7a). See *In re Ljusne Katting, A.B.,* No. 85-2573 (5th Cir. Dec. 11, 1985) (holding that the plaintiffs must use the Hague Evidence Convention in the first instance when seeking on-site inspections and depositions on foreign soil).

[18] Germany's assertion of judicial sovereignty, advanced through diplomatic notes and participation in this litigation, is, of course, entitled to similar consideration. We note, however, that the record in these cases does not reveal the precise nature of Germany's "judicial sovereignty." That concept perhaps reflects Germany's general interest in protecting the personal privacy of its citizens. But if that is the case, the German interest should receive diminished deference from foreign tribunals in situations where the German citizen has, in effect, waived that protection by taking actions that

Germany's claim of judicial sovereignty must be weighed against the United States' substantial interest in affording litigants in its courts adequate opportunities to discover the pertinent facts surrounding their claims. The United States' interest finds explicit expression in the discovery provisions of the Federal Rules of Civil Procedure. Those provisions are central to the conduct of federal judicial proceedings. The "pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedures." *Hickman* v. *Taylor*, 329 U.S. 495, 500 (1947). It provides the preferred method for parties to narrow the basic issues and ascertain the existence of facts germane to those issues, ensuring that "civil trials in the federal courts no longer need be carried on in the dark." *Id.* at 501.

Petitioners do not presently dispute the scope or relevance of the evidence sought.[19] Nor do they claim that there are practical or logistical obstacles to producing the evidence in the United States. Thus, there seems to be no serious doubt that compliance with the discovery orders will advance the ultimate resolution of the law suits. On the other hand, petitioners acknowledge that discovery conducted pursuant to the Convention procedures "may be somewhat more time-consuming or cumbersome than a direct discovery order to the foreign party" (85-98 Pet. 20; 85-99 Pet. 18-19). Of particular importance, the district judge in *Anschuetz* and the magistrate in *Messerschmitt* both concluded that resort to the Convention to obtain pretrial discovery of relevant documents would prove futile in light of Germany's express refusal to execute letters of request for that purpose (85-98 Pet. App. 32a; 85-99 Pet. App. 14a).

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subject him to the foreign court's jurisdiction. Furthermore, it is not clear whether German courts would decline to order production of evidence located in a foreign country. One German commentator has suggested that "European courts make a similar claim, although this claim is hidden behind a different configuration of the relevant legal institutions and norms." P. Schlosser, *Der Justizkonflikt zwischen den USA und Europa* 44 (1985) (English Summary). See also *id.* at 45-46.

[19] The magistrate rejected Anschuetz's challenge to the breadth of the discovery order. See 85-98 Pet. App. 4a-5a. We express no opinion whether that ruling is correct under American discovery standards. Messerschmitt did not challenge the scope or relevance of the discovery sought. See 85-99 Pet. App. 11a.

Given these circumstances, we think that the court of appeals could properly refuse to grant mandamus relief excusing petitioners from production of documents and deponents in the United States. As petitioners acknowledge, the mandamus remedy is "by its very nature extraordinary" (85-98 Pet. 13; 85-99 Pet. 12). The writ ordinarily issues only when "there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964) (quoting *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953)). Germany's claims of judicial sovereignty do not provide a sufficiently compelling basis in these particular cases to justify issuance of a prerogative writ.[20] In our opinion, those claims also lack sufficient force to justify this Court's review.[21]

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[20] Other courts have refused to follow the Hague Evidence Convention under similar circumstances. See, *e.g.*, *Lowrance* v. *Weinig*, 107 F.R.D. 386 (W.D. Tenn. 1985); *Work* v. *Bier*, 106 F.R.D. 45 (D.D.C. 1985); *International Society for Krishna Consciousness, Inc.* v. *Lee*, 105 F.R.D. 435 (S.D.N.Y. 1984); *Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.*, 105 F.R.D. 16 (S.D.N.Y. 1984); *Murphy* v. *Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D. Vt. 1984); *Graco, Inc.* v. *Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Lasky* v. *Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983); *Wilson* v. *Lufthansa German Airlines*, 108 A.D.2d 393, 489 N.Y.S.2d 575 (1985).

[21] In *Anschuetz*, the court of appeals stated (85-98 Pet. App. 26a) that "[t]he Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules." This statement, viewed in isolation, is plainly overbroad. We view it, in context, as simply a poorly-phrased observation that the Convention is not exclusive. Indeed, the court of appeals quickly added that if "discovery * * * of Anschuetz in Germany becomes particularly intrusive * * *, then the [district] court may order the parties to conduct that discovery under the Hague Convention" (*ibid.*). And the court of appeals in *Messerschmitt* undertook a brief comity analysis even though the discovery order under review was limited to production of evidence within the United States (85-99 Pet. App. 3a-5a). Some courts, in interpreting *Anschuetz*, have placed undue weight on the *Anschuetz* dictum. See *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 124 (8th Cir. 1986); *Lowrance* v. *Weinig*, 107 F.R.D. 386, 389 (W.D. Tenn. 1985). We do not understand that dictum as displacing the need for a discriminating comity analysis even in those instances where discovery from parties is to occur in the United States. See *Work* v. *Bier*, 106 F.R.D. 45, 54-56 (D.D.C. 1985); *Griffis* v. *Aerospatiale Helicopter Corp.*, Civ. No. A-83-602 (D. Alaska June 3, 1985), slip op. 8-12, petition for mandamus pending, No. 85-7556 (9th Cir. filed Oct. 10, 1985). In all events, this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

Petitioners observe that application of comity principles to the use of the Hague Evidence Convention has prompted considerable litigation and has resulted, at times, in seemingly inconsistent results (85-98 Pet. 7-13; 85-99 Pet. 6-12). They suggest that review by this Court is necessary to secure a uniform rule concerning the Convention's application.

We disagree. The decisions below—"the first time a circuit court has considered the interplay between the Hague Convention and the Federal Rules" (85-98 Pet. App. 6a)—are basically consistent with the better reasoned and more prevalent trend in the case law, which recognizes that resort to the Hague Evidence Convention depends on the particular circumstances in each individual case.[22] They provide appellate affirmation that the Hague Convention is not the exclusive mechanism for obtaining evidence abroad and that a comity analysis is necessary to determine its precise application.[23] The decisions, though somewhat cursory in their comity analyses, should tend to clarify these controlling general principles of international discovery. We expect that other courts will discern and apply these principles and, as a result, dispel any confusion in the preexisting district court decisions. Furthermore, the United States is clearly on record, through this submission, as to how the Convention should be applied. That, too, should minimize confusion among the lower courts in the future. We therefore believe that there is no need for this Court to intervene at this time.

Petitioners also contend that the decisions below, by refusing to require first resort to the Hague Evidence Convention, conflict with a recent decision of the Supreme Court of West Vir-

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[22] See, *e.g.*, *International Society for Krishna Consciousness, Inc.* v. *Lee*, 105 F.R.D. 435, 449-450 (S.D.N.Y. 1984); *Compagnie Francaise D'Assurance* v. *Phillips Petroleum Co.*, 105 F.R.D. 16, 29-32 (S.D.N.Y. 1984); *Murphy* v. *Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360, 362-363 (D. Vt. 1984).

[23] In *Anschuetz*, the court of appeals "left this comity analysis to the district court on remand" (85-99 Pet. App. 4a; see 85-98 Pet. App. 27a), while in *Messerschmitt*, the court itself conducted a brief comity analysis (85-99 Pet. App. 4a-5a). These decisions thus recognize that a comity analysis is necessary. The Fifth Circuit recently reaffirmed the importance of comity considerations in *In re Ljusne Katting, A.B.*, No. 85-2573 (5th Cir. Dec. 11, 1985), holding that the Hague Evidence Convention must be used in the first instance when seeking on-site inspections on foreign soil and depositions of foreign nationals outside the control of the foreign defendant.

ginia, *Gebr. Eickhoff Maschinenfabrik Und Eisengieberei mbH* v. *Starcher,* 328 S.E.2d 492, 506 (1985). It appears, however, that the differences between the West Virginia Supreme Court and the Fifth Circuit are relatively modest and do not create a meaningful conflict requiring this Court's review. The supposed conflict seems to stem largely from different assessments of the Convention's effectiveness in securing needed discovery.[24] This Court is not well postured to address that essentially factual dispute. Moreover, *Starcher* was decided just two weeks after *Anschuetz* and nearly one month before *Messerschmitt.* Thus, the West Virginia court did not have the benefit of the Fifth Circuit's views. In these circumstances, the state court decision does not create a conflict of particularly pressing consequence.[25]

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[24] The trial court in *Starcher* ruled that West Virginia discovery procedures must be followed despite the existence of the Convention, apparently giving no consideration to the comparative effectiveness of the Convention's alternative procedures. See 328 S.E.2d at 495. In reversing, the West Virginia Supreme Court indicated that "the principle of international comity dictates first resort to [Convention] procedures until it appears that such attempt has proven fruitless and that further action is necessary to prevent an impasse." 328 S.E.2d at 506. By contrast, the district judge in *Anschuetz* and the magistrate in *Messerschmitt* had both determined, prior to appellate review, that use of the Convention would not provide fully adequate discovery (see 85-98 Pet. App. 32; 85-99 Pet. App. 14a). The court of appeals plainly considered this factor important (see 85-98 Pet. App. 15a-16a; 85-99 Pet. App. 3a-5a). Thus, the divergent results among the cases may simply reflect different perceptions of the Convention's effectiveness. Other decisions from lower courts that have required first resort to the Convention procedures can also be reconciled on this basis. See *Laker Airways, Ltd.* v. *Pan American World Airways,* 103 F.R.D. 42, 51 (D.D.C. 1984); *Philadeliphia Gear Corp.* v. *American Pfauter Corp.,* 100 F.R.D. 58, 60 n.3 (E.D. Pa. 1983); *Pierburg GmbH & Co. KG* v. *Superior Court,* 137 Cal. App. 3d 238, 244, 186 Cal. Rptr. 876, 880 (1982); *Vincent* v. *Ateliers de la Motobecane, S.A.,* 193 N.J. Super. 716. 721-724, 475 A.2d 686, 689-691 (1984); *Th. Goldschmidt A.G.* v. *Smith,* 676 S.W.2d 443, 445 (Tex. Ct. App. 1984).

[25] We note, in particular, that the purported conflict presents a comparatively minor difference in the accommodation of foreign claims of judicial sovereignty, is purely procedural, and does not subject similarly situated litigants to different standards of liability. The West Virginia litigant, like petitioners, remains obligated to produce the requested discovery; he is simply permitted to attempt production, in the first instance, through the Convention procedures. See 328 S.E.2d at 506. It would appear that future West Virginia

In sum, we suggest that the decisions below are basically correct and will provide adequate guidance for future cases raising similar issues. Further review is unlikely to be productive. Application of the Hague Evidence Convention inevitably turns on the facts of each case; it depends on intractable factors such as the identity of the parties, the nature of the dispute, the type of discovery sought, the countries involved, and their ability and willingness to provide effective implementation of the Convention. Accordingly, it would be difficult for this Court to provide additional specific guidance to the lower courts. Those courts, which have first-hand exposure to the Convention, can address future questions on a case-by-case basis in light of the needs of the particular litigants and the potential utility of the Convention under the circumstances. This Court should intervene, of course, if truly aberrant decisions result. At present, however, we do not perceive a need for this Court to act.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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litigants seeking foreign discovery can resist first recourse to the Convention by establishing to the court's satisfaction that use of the Convention will prove fruitless. Likewise, we expect that future Fifth Circuit litigants seeking foreign discovery may be required to resort to the Convention if the foreign party can demonstrate that use of the Convention will provide effective and efficient discovery.

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